

THE
AMERICAN JOURNAL
OF
INTERNATIONAL LAW



VOLUME 6

1912

PUBLISHED FOR
THE AMERICAN SOCIETY OF INTERNATIONAL LAW
BY
BAKER, VOORHIS & COMPANY,
NEW YORK, U. S. A.

COPYRIGHT, 1912

BY

THE AMERICAN SOCIETY OF INTERNATIONAL LAW

TABLE OF CONTENTS, VOLUME SIX

[No. 1, January, 1912, pp. 1-277; No. 2, April, 1912, pp. 278-582; No. 3, July, 1912, pp. 583-798; No. 4, October, 1912, pp. 799-1087.]

THE DEVELOPMENT AND FORMATION OF INTERNATIONAL LAW. <i>Ernest Nys</i>	1
HISTORY OF INTERNATIONAL LAW SINCE THE PEACE OF WESTPHALIA. <i>Amos S. Hershey</i>	30
THE GOVERNMENT OF THE UNITED STATES AND AMERICAN FOREIGN MISSIONARIES. <i>James Brown Scott</i>	70
BULGARIAN INDEPENDENCE. <i>Georges Scelle</i>	86
RETALIATION IN WAR. <i>Henry Wager Halleck</i>	107
THE HISTORY OF THE DEPARTMENT OF STATE. PART IX. <i>Gaillard Hunt</i>	119
THE DEVELOPMENT AND FORMATION OF INTERNATIONAL LAW. II. <i>Ernest Nys</i>	279
THE EVOLUTION OF A PERMANENT INTERNATIONAL JUDICIARY. <i>James Brown Scott</i>	316
THE FRENCH SPOILIATION CLAIMS. <i>George A. King</i>	359
THE INTERNATIONAL LAW OF AERIAL SPACE. <i>Amos S. Hershey</i>	381
RUSSIA'S LIABILITY IN TORT FOR PERSIA'S BREACH OF CONTRACT. <i>Clement L. Bowé</i>	389
IS HUDSON BAY A CLOSED OR AN OPEN SEA? <i>Thomas Willing Balch</i>	409
THE REAL SIGNIFICANCE OF THE DECLARATION OF LONDON. <i>Elihu Root</i>	583
GENERAL ARBITRATION TREATIES. <i>Richard Olney</i>	595
THE ANGLO-GERMAN TENSION AND A SOLUTION. <i>F. E. Chadwick</i>	601
THE ARBITRATION TREATIES AND THE SENATE AMENDMENTS. <i>William Cullen Dennis</i>	614
THE FRENCH SPOILIATION CLAIMS. PART II. <i>George A. King</i>	629
CAPTURE AFTER CAPITULATION: A JURISTIC ANACHRONISM. <i>Howard Thayer Kingsbury</i>	650
BULGARIAN INDEPENDENCE. <i>Georges Scelle</i>	659
THE HISTORY OF THE DEPARTMENT OF STATE. PART IX. <i>Gaillard Hunt</i>	679
THE "PROTOCOLE ADDITIONNEL" TO THE INTERNATIONAL PRIZE COURT CONVENTION. <i>George C. Butte</i>	799
THE FRENCH SPOILIATION CLAIMS. PART III. <i>George A. King</i>	830
THE NINTH INTERNATIONAL RED CROSS CONFERENCE. <i>Baron S. A. Korff</i>	858
THE INTERNATIONAL OPIUM CONFERENCE. <i>Hamilton Wright</i>	865
THE LAW OF NATIONS. <i>Alpheus Henry Snow</i>	890
NOTES ON RIVERS AS BOUNDARIES. <i>Charles Cheney Hyde</i>	901

THE HISTORY OF THE DEPARTMENT OF STATE. PARTS IX AND X. <i>Gaillard Hunt</i>	910
BOARD OF EDITORS	149, 460, 699, 931
EDITORIAL COMMENT:	
Tripoli	149
Russia and Persia	155
Morocco	159
The pending treaty of arbitration between the United States and Great Britain	167
Was the award in the North Atlantic Fisheries case a compromise?	178
Naval prize bill and the Declaration of London	180
The passport question between the United States and Russia	186
The International Joint Commission between the United States and Canada	191
Sixth annual meeting of the American Society of International Law	197
The Carnegie Endowment for International Peace and its projects	203
The treaties of arbitration with Great Britain and France	460
Mediation in the Turko-Italian War	463
Recent political developments in China	467
Decision of the Supreme Court in <i>Rocco v. Thompson</i>	473
Mexico	475
The Horcon Ranch Case	478
The use of balloons in the war between Italy and Turkey	485
The conventions on maritime law	488
Maryland <i>v.</i> West Virginia	491
Secretary Knox's visit to Central America	493
French protectorate established in Morocco	699
The Brazilian coffee case	702
The closing and reopening of the Dardanelles	706
The Canevaro case at The Hague	709
The development of the Monroe Doctrine	712
Denmark — The death of King Frederick VIII.	714
Applicability of the case of <i>Altman v. The United States</i> to special agreements concluded under a general treaty of arbitration	716
The basis of mediation in the war between Italy and Turkey	719
William T. Stead	722
Approval of the Declaration of London by the United States Senate	723
Eighteenth Lake Mohonk Conference on International Arbitration	725
The Sixth Annual Meeting of the Society	729
Congress of jurists at Rio de Janeiro	931
The concentration of the French fleet in the Mediterranean and the Triple Entente	935
The Magdalena Bay resolution	937
The Christiania meeting of the Institute of International Law	939
The Emperor of Japan	944
The American Institute of International Law	949
Spanish edition of the American Journal of International Law	957
French diplomatic agents and their jurisdiction as civil status officers stationed abroad	959

TABLE OF CONTENTS

v

EDITORIAL COMMENT — *Continued.*

The Cerruti Arbitrations.....	965
Frédéric Passy.....	975
The Panama Canal Act.....	976

✓ CHRONICLE OF INTERNATIONAL EVENTS. *Otis G. Stanton* 209, 499, 734, 985

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW. <i>George A. Finch</i>	218, 507, 740, 991
--	--------------------

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW:

State <i>v.</i> Gallardo <i>et al.</i>	220
Faber <i>v.</i> United States.....	230
Award in the fur-seal arbitration between the United States and Great Britain.....	233
Herrera <i>et al. v.</i> United States.....	509
Maryland <i>v.</i> West Virginia.....	517
Rocca <i>v.</i> Thompson.....	535
Award of the Hague Tribunal in the Canevaro case between Italy and Peru	746
Ker and Co. <i>v.</i> Couden.....	754
Supreme Court of Cuba in members of crew of Celtic Princess <i>v.</i> British Consul.....	757
Switzerland <i>v.</i> France, Award of August 3, 1912 concerning interpretation of commercial convention of October 20, 1906.....	995
Italy <i>v.</i> Colombia, Cerruti case:	
Report of the Mediator, January 26, 1888.....	1003
Award of the President of the United States, March 2, 1897.....	1015
Award of Arbitral Commission, Rome, July 6, 1911.....	1018

BOOK REVIEWS:

Baty: <i>Britain and Sea Law</i>	242
Arias: <i>The Panama Canal</i>	243
Stockton: <i>A Manual of International Law</i>	245
Barbagelata: <i>Boundaries</i>	246
Bray: <i>British Rights at Sea under the Declaration of London</i>	249
Hazeltine: <i>The Law of the Air</i>	251
Wehberg: <i>Capture in War on Land and Sea</i>	252
Rapisardi-Mirabelli: <i>Il Significato della Guerra nella Scienza del Diritto Internazionale</i>	254
Macdonnell: <i>Some Plain Reasons for Immunity from Capture of Private Property at Sea</i>	256
Anonymous: <i>The Finnish Question in the Year 1911</i>	268
Niemeyer: <i>Das Seekriegsrecht nach der Londoner Deklaration</i>	543
Beckenkamp: <i>Die Kriegskonterbande in der Behandlung des Instituts für internationales Recht und nach der Londoner Erklärung über das Seekriegsrecht</i>	543
Smith & Wylie: <i>International Law</i>	544
Spaight: <i>War Rights on Land</i>	546
Bridgman: <i>The First Book of World Law</i>	547
Bentwich: <i>The Law of Domicile in its Relation to Succession</i>	548

BOOK REVIEWS — Continued.

Landa: <i>The Alien Problem and its Remedy</i>	554
Hackett: <i>Reminiscences of the Geneva Tribunal of Arbitration</i>	557
B. de Jong: <i>In't Zicht der Derde Vredesconferentie</i>	560
Saiki: <i>The World's Peace</i>	562
Phillipson: <i>The International Law and Custom of Ancient Greece and Rome</i>	565
Wehberg: <i>Die Abkommen der Haager Friedenskonferenzen, der Londoner Seekriegskonferenz nebst Genfer Konvention; Sind die Ansprüche der Gebrüder Mannesmann nach Treu und Glauben in vollem Umfange zu rechtfertigen?; Die internationale Friedensbewegung; Internationale Schiedsgerichtsbarkeit; Ein internationaler Gerichtshof für Privatklagen; Das Völkerrecht und das italienische Staatsversicherungsmonopol; Kommentar zu dem Haager "Abkommen betreffend die friedliche Erledigung internationaler Streitigkeiten" vom 18. Oktober, 1907</i>	760
Jacomet: <i>La Guerre et les Traités</i>	765
Demorgny: <i>La Question du Danube</i>	766
Edler: <i>The Dutch Republic and the American Revolution</i>	768
Martini: <i>L'Expulsion des Étrangers</i>	770
Chaunier: <i>La Bulgarie. Étude d'histoire diplomatique et de droit international</i>	775
Willoughby: <i>Principles of the Constitutional Law of the United States</i>	776
Nys: <i>Une clause des traités de 1814 et de 1839 "Anvers, Port de Commerce"</i>	778
Poortugael: <i>La Naturalité sur l'Escaut</i>	778
Morris: <i>International Arbitration and Procedure</i>	781
Higgins: <i>War and the Private Citizen</i>	784
Bouvé: <i>Exclusion and Expulsion of Aliens in the United States</i>	1030
Paullin: <i>Diplomatic Negotiations of American Naval Officers</i>	1032
Charmes: <i>Les Questions actuelles de Politique étrangère en Europe</i>	1035
Gribowski: <i>Das Staatsrecht des Russischen reiches</i>	1037
Erich: <i>Das Staatsrecht des grossfürstentums Finnland</i>	1039
Strupp: <i>Urkunden zur Geschichte des Völkerrechts</i>	1041
Report of Conference: <i>Nationalities and Subject Races</i>	1045
Wilson: <i>Handbook of International Law</i>	1049
Barclay: <i>The Turco-Italian War and its Problems</i>	1050
Asmundo: <i>L'Arte della Pace</i>	1052
Oppenheim: <i>International Law</i>	1054
Stael-Holstein: <i>La Réglementation de la guerre des airs</i>	1056
Balch: <i>International Courts of Arbitration</i>	1057
Porter: <i>The Full Recognition of Japan</i>	1058
PERIODICAL LITERATURE OF INTERNATIONAL LAW. Kathryn Sellers 268, 569, 788, 1063	

SUPPLEMENT — IMPORTANT TEXTS OF AN INTERNATIONAL CHARACTER

THE AMERICAN JOURNAL OF INTERNATIONAL LAW is supplied to all members of the American Society of International Law without extra charge, as the membership fee of five dollars per annum includes the right to all issues of the JOURNAL published

during the year for which the dues are paid. (Members residing in foreign countries pay one dollar extra per annum for foreign postage.)

The annual subscription to non-members of the Society is five dollars per annum (one dollar extra is charged for foreign postage), and should be placed with the publishers, Baker, Voorhis & Company, 45 and 47 John Street, New York City.

Single copies of the JOURNAL will be supplied by the publishers at \$1.25 per copy.

Applications for membership in the Society, correspondence with reference to the JOURNAL, and books for review should be sent to James Brown Scott, Editor in Chief, 2 Jackson Place, Washington, D. C.



THE DEVELOPMENT AND FORMATION OF INTERNATIONAL LAW *

I. LAW AND ITS PHILOSOPHIC ASPECT

"Law in general," says Montesquieu, "is human reason so far as it controls all the people of the earth, and the political and civil laws of each nation can only be considered as individual cases in which this human reason is applied." Reason was held by the Romans to constitute one of the fundamental elements of law. Cicero announced the existence of "a veritable law, true reason (*recta ratio*), in conformity with nature, universal, immutable and eternal, the commands of which constitute a call to duty and the prohibitions of which avert evil."

It is at present unnecessary to consider what influence the Stoic, Academic and Epicurean doctrines had on Roman jurisprudence, and it would be risky to support as absolutely final any view which might be expressed on the subject. During the last phases of the Republic there had already come to exist in the world's capital a fusion of the different schools of philosophy; and traces of the Platonic teachings constantly appear in the expression of the great orator's lofty thought.

However that may be, with the passing centuries, jurists extolled the importance of human reason and lauded its noble and fruitful effects. Francois de Vitoria was one of the most famous representatives of the science of law in the sixteenth century, and according to him, reason was human intelligence, and at the same time freedom of will. In 1563 Ferdinand Vasquez Menchaca, a Spanish lawyer of equal fame, spread the doctrine that natural law was nothing but true reason (*recta ratio*), an inborn quality of the human race. He who is known as the father of the law of nations, Hugo Grotius, wrote as follows:

* Translated by courtesy of Mr. Clement L. Bouvé, of the Bar of the District of Columbia.

Natural law consists of certain principles of true reason, which teach us that an act is either morally honest or dishonest according to its fitness or necessary unfitness in so far as it applies to a state of nature founded on reason and social relations, and that consequently God, the creator of all nature, requires or prohibits the commission of such an act.

Barbeyrac, the translator and annotator of the work of Grotius, cited, in connection with this subject, the words of Philo of Alexandria:

True reason is a veritable law in itself, a law both incorruptible and eternal, not inscribed by the hand of this or that mortal on documents or inanimate columns, but blazoned upon an immortal intelligence by the hand of immortal nature.

According to the doctrine of Grotius, natural law orders or prohibits the commission of acts obligatory or unlawful of themselves and by virtue of their own essence. But this natural law is of so immutable a nature that God himself is powerless to change it. Regarding law in general based upon the social relations of the human race, the famous historian is of the opinion that it exists apart from a divine will, and that it would be bound to develop even in the absence of God or in the absence of any divine solicitude for human affairs.

Rolin-Jaequemyns most successfully interpreted this last idea which had been the cause of great difference of opinion between commentators; he was of the opinion that it expressed the meaning that the instinct of sociability and the existence of reason in mankind are facts, proof of which is independent of the existence of a supreme being.

II. POSITIVE LAW

This lofty thought is an off-shoot of the philosophy of law, and the philosophy of law does not consist of a collection of useless and contradictory speculations. It is real; it is useful; it constitutes itself a scientific study, the object of which is to discover fundamental principles. Only, side by side with the determination of principles of juridical rules there exists a limitless array of examples and of facts, which ever since the beginning of humanity show that the relations among men, their daily contact and their every action have been controlled by rules which have grown out of custom or resulted

from express decrees; and that the end and aim of these rules has been to safeguard the liberty of all men by guaranteeing system to all, that is to say, harmonious action. Throughout each successive phase of civilization the duty of applying these rules has been confided either to parties actually interested who had recourse to force, or to arbitrators chosen by the parties, or finally, to judges who derived their jurisdiction from a superior authority. That loyalty which is inherent in mankind and which an appreciation of his own interest tends to develop results in the general application of the juridical ruling without the necessity of having recourse to some other means for its enforcement. But when the necessity of such action exists sanction is not lacking. At first it is manifested by maledictions or by denouncement as well as by the imposition of penalties; with the march of civilization sanction finds its expression in the infliction of damages, as well as in that of punishment, such as imprisonment. This power necessarily varies as do the authorities charged with exercising it. Certain sanctions are so ill-defined as to be scarcely perceptible. The weight of public opinion is frequently sufficient to bring about a given result. When civilization reaches a high stage, men fulfill their juridical duties without even considering the question as to whether or not they are obliged to do so. Law does not necessarily mean constraint; it is an error to say that *Recht ist zwang*. Such a conception is the result of imperfect vision. Law even if broken, even if crushed under foot, is none the less law.

The fields of law are varied and distinct. Next to the domains of private law come those of public and international law; and it goes without saying that the progress of all three has not maintained an equal pace. While in the domain of private law, people who have reached a complete state of civilization can point with pride to laws clearly set forth, to tribunals perfectly organized in all things that concern their jurisdiction, and in their utter freedom to expound the law, and to a complete civil and penal system, the same claim may not be made on behalf of public law, already on a firm foundation to be sure, but where the constitutional pact has not always defined with precision the judicial method by which the respect of institutions

shall be assured, and where recourse to warlike methods to be employed even against the subjects of the state, is still authorized under the name of martial law. Nor can the same claim be made on behalf of the international law, in which there still remain, doubtless, gaps to be filled, but in the field of which there has appeared, in modern times, a spirit zealous for reform, and a desire to introduce those improvements which are so necessary, and to complete the scope of juridical authority.

A splendid picture is revealed by the contemplation of the history of law, and of the successive phases of the development of human genius coming down, step by step, through the ages; the study reveals rich vistas of research, and the juridical institutions of nations constitute, among all the attributes of civilization, the highest symbols of modern progress. This is true with regard to both private and public law; it is also true with regard to the law of nations. It must be admitted that the latter has not yet reached the state of development attained by private and public law, but that its development is a vital fact can not be denied; and it may be confidently stated that the question of whether or not international law is real law must be answered in the affirmative, and the theory that the combination of rules which regulate the relations of states are only binding in a moral sense on the members of the family of nations must be discarded.

According to John Austin, James Mill, and John Stuart Mill, jurisprudence included simply positive law, that is to say, law which is established by political superiors. They discerned the existence of two fundamental ideas in the notion of positive law: that of commandment, that of sanction. They took the ground that international law failed to embrace the requisite qualifications, viewed either from the standpoint of the power which enforced it, or from the standpoint of sanction. As we shall have occasion to point out, this idea of the intrinsic nature of law was incomplete, and due to the misconception of its historic formation. But the erroneous view was shared by others besides philosophers. It was long maintained by statesmen as well, and a striking example thereof appears in the statement in

the House of Lords by the Marquis of Salisbury, not twenty-five years ago: "International law," said he, "has not any existence in the sense in which the term *law* is usually understood. It depends generally upon the prejudice of written text-books. It can be enforced by no tribunal, and therefore to apply to it the term *law* is to some extent misleading." The noble lord desired in these terms to demonstrate the futility of the efforts of those who were advocating the establishment of a court of international arbitration. The words were spoken in July, 1887; twelve years later, the First Peace Conference which united at the Hague the representatives of twenty-six states, adopted the Convention for the Pacific Settlement of International Disputes, and announced the wish of the Powers to organize a permanent court of arbitration, accessible at any time.

III. FIRST MANIFESTATIONS OF LAW IN THE ANCIENT CIVILIZATION

"At the commencement of civilization," wrote Marcellin Berthelot, "all knowledge assumes the form of religion and mystery. Every action was attributed to the gods, identified with constellations, with unusual celestial and terrestrial phenomena, and with all the forces of nature. No man would have dared at that time to carry out a political, military, medical or industrial task without having recourse to sacred formula, the purpose of which was to obtain the good will of the mysterious powers which governed the universe." Law in its development was not free from these influences. In its first phases it was connected with magic and religious practices. Magic consists in the belief in the force which produces results against the course of nature; religion proceeds on the theory that man is dependent upon divinities and owes them his worship. Even the religious monotheists admitted that their God had created magical energy and that he permitted mankind to employ it. Only, as Edward Westermarck remarks: "Besides this sort of magic, there is another kind — witchcraft, in the narrow sense of the term — which is ascribed to the assistance of exorcised spirits, regarded not as the willing agents, but as the adversaries of God, and this practice is naturally looked upon as highly offensive to His feelings."

To revert to the subject of law, it appears that in Babylon sanction was furnished by means of sacred emblems and maledictions; the question of religious protection had not yet arisen. Other civilizations did not fail to fall within the sphere of this fatal influence. Amongst all the nations of remote antiquity the practice of magic had full play; incantations and proceedings for the purpose of obliging parties to respect their engagements or to submit to sentences, are to be found in large numbers; they consist above all in pronouncing denunciations against the offender. For the purpose of proving the truth, modern law has concentrated its energies in establishing a system of proof, that is to say, reasonable methods of affirming or denying such or such a state of facts. According to the famous naturalist, Lamarck, judgment in its broadest sense is "the total result of comparisons made by the mind between the various differing ideas." In the primitive societies "ordalies" were preceded by exhortations. "It was constantly supposed," writes Maxime Kovalewsky, "that a force unknown and independent of the human will would come to the rescue of the weakness and spiritual blindness of the judge, and would disclose to him truths for which he would search in vain unaided, except by the limited means which he himself possessed." Let us not forget that the influence of ancient magic practices was felt with more or less force even in modern times. The French author, Huvelin, describes the significance of the oath in the following well-chosen words:

The affirmative oath, the oldest known by which the party sworn agrees to bear witness to the truth of an allegation regarding a past fact, has a religious character. It includes complex rites, and often a sacrifice. It is looked upon as a judgment of God; if he who takes it perjures himself, God may smite him upon the instant. The promissory oath by which a party binds himself with regard to a future act appears at a more recent date, and only has a religious significance for the party himself. In connection with an adjuration to the Gods, and at times, with sacrificial rites, it partakes of a conditional malediction, expressed or unexpressed, pronounced by the party against himself in the case of perjury. This malediction gives to the promissory oath an aspect more magical than religious. Almost all oaths have become promissory in the course of time, such as oaths of fidelity (allegiance), the oath administered by the magistrate, the juror's oath. The oath given by the witness

assumes this character only when witnesses cease to assume the part of conjurors bringing unconditional support to the defender, and become merely persons who promise to tell the truth.

A famous English jurist, Sir Frederick Pollock, has shown how the religious history of the obligation has repeated itself in the history of English law in the Middle Ages. He says:

It is certain that in England up to the fifteenth century obligations were more or less religious. The civil bond was of meagre obligatory force. This was followed by the oath or the *fides facta*, which was very nearly the same thing. The violation of the *fides facta* constituted an ecclesiastical crime, which brought about spiritual censure, excommunication, etc. That was the situation up to the fifteenth century, but the secular tribunals became aware that they were losing their cases; thereupon, a series of very ingenious fiction was introduced.

It is unnecessary to recall the fact that in the Middle Ages the oath was the great moral guarantee of conventions between Christian princes. A religious atmosphere surrounded international pacts: the claims of the Church, which was anxious to confer jurisdiction upon its tribunals, were solemnized by invocations to the divinity contained in the texts themselves, by religious ceremonies and by the taking of oaths. A doctrine was sought to be established whereby every breach of international law was to be considered a litigation in which the ecclesiastical judge might intervene, simply and solely because the question of peace was in issue. In the fifteenth century Martin of Lodi wrote:

The Pope has the power to force princes to respect the terms of a peace which has been concluded; the crime of breach of the peace amongst princes originates in the ecclesiastical courts.

It must be remembered that in the social organization which characterized the first ages of humanity, the application of juridical rules is seldom to be found. There was scarcely any occasion therefor in the internal administration of the clan. In fact, it may be said that the first indications of law taken chronologically are those of inter-tribal law. It was between tribe and tribe that contact was produced, and even here, actions which to-day are considered culpable and criminal appeared just and meritorious. Ravishment or theft assumed

significance only when the victims belonged to another tribe. Let us recall the curious remark made in the sixteenth century by William Lambarde in the *Eizenarcha or of the office of the justice of peace*, the first edition of which appeared in 1581. "Thieves," said he, "we called them until the number of seven men, from seven a troupe until the number of thirty-five, and an army above that number." Thus is the belligerent nature of theft made clear, and the criminal nature of loot!

The first judgments took the form of oracular expressions of the deity. Huvelin correctly points out that these judgments constituted veritable juridical rules for the future, and that the idea that judgments are only relative and binding upon the parties to a cause is of recent origin. Moreover, was not the ancient view that judgments had a general force to be found in the *arrets de régleme*nt of the French parliaments prior to the Revolution of 1789? Is it not to be found reasserting itself even in our own days in various countries in the power attributed to the courts to make common law without precedents? Does it not, moreover, constitute the basis of the authority attributed in all lands to a series of uniform judicial decisions?

Law in its religious aspect appears in the Homeric epics; the *θέμistes* are the judgments which emanate from the gods; as yet "law" does not exist. The word *δίκη* means custom in its embryonic state. It has a significance varying between our understanding of the terms *judgment* and *custom*. It proves the existence of a set of rules more developed than the *θέμistes* but the word *νόμος* law, which was later to occupy a place of considerable importance in the political vocabulary of the Greeks, does not yet appear at this stage.

At Rome it was religion which was the guarantor of property rights; the latter as well as the "champ" were placed under the protection of domestic gods. Under this system it was necessary that the hearth be surrounded by a boundary consisting, perhaps, of a hedge, of a grove of trees, of a stone wall. This boundary was sacred and it was an act of impiety to cross it. There should likewise be a boundary surrounding what was known as the *champs*, or a small area of soil of several feet in extent, which was to remain unculti-

vated. Large stones or the trunks of trees constitute the termini and the sacred boundaries. Man and beast who touched the termini became "devotees," or subject to being sacrificed by way of expiation. These notions are to be found among numerous other peoples. The idea is not limited to private law; it is to be found in that body of law which we to-day call international law. In relations between nations one of the fundamental conditions of the maintenance of order is respect for frontiers, and here, too, both magic and religious sanction came into play; the gods were sure to punish the violation of frontier rights.

The pontiffs formed a college, which, up to the middle of the fifth century succeeding the foundation of the city, monopolized the interpretation of the law. Paul Frederick Girard wrote:

The science of law was at that time, at least to all practical purposes and to a very great extent, monopolized by the Pontiffs. As the result of the commingling of principles of private law and religion, the influence of the *calendrier* upon justice, and also perhaps as the result of the primitive religious character of the *sacramentum*, they certainly had, in spite of many obscurities, a notable effect upon practice, and it is easy to see that they must have sought to make a sort of secret capital out of this practical knowledge—a monopoly as far as their body was concerned.

They did not represent a caste, but the city and three tribes probably bore an equal part. Moreover, their proper duties consisted in watching over the application of sacred law, in superintending divine worship, and in supervising the performance of propitiatory or expiatory ceremonies.

Like other nations of antiquity, the Romans sought to gain the favor of the gods before entering upon any war. Writes Guido Fusinato:

We see them offering up sacrifices, prayers, and vows, on the eve of going into battle; and, moreover, they attempted invariably to prove to the gods that Rome had suffered an outrage, and they answered the call to arms only because they were absolutely forced to do so. This was the purpose of the functions of the *feciales* on the brink of war. The ceremonials to be performed were prescribed with the greatest precision, as were the number of times which the *feciales* were to proceed to the

enemy's frontiers, the delays to be observed, the formulas to be employed, the color and material of their clothes, and the sacred herb, the symbol of their mission.

When they declared war, it was the duty of the *feciales* to hurl lances into the enemy's territory.

As times passed the Roman arms carried Roman dominion into far-off lands. In view of the great extent of territory subject to the Republic, and, consequently, the remoteness of the enemy's country, it became impossible to carry out these formalities. The difficulty was met by having a soldier of the army of Pyrrhus, who had been captured, buy a block of land in front of the temple of Bellona, and by looking upon this block as enemy territory. The conventional forms adopted by the Romans for declaring war were taken up in the last centuries of the Middle Ages by authors who devoted themselves to developing them and recommending their adoption. The usages of the nations who had invaded occidental Europe, and established themselves there, were merged in this conception, and thus the obligation of the *diffidatio* or defiance, introduced for the purposes of private warfare by the laws of emperors and kings, was, in connection with the former traditions, influential in bringing about the necessity of a solemn declaration of war.

The Romans were not satisfied with invoking the good will and support of their own gods; when war broke out, the pontiffs adjured the tutelary deities of the hostile city to deliver her into their hands, and in order that their prayers might be met they even caused a temple to be founded in Rome dedicated to the foreign gods. The *evocatio* tended to displace the practice of invoking the divine protection of the alien gods. Their good will could not be taken by storm; thus their consent was necessary. In the year 396 B. C., Queen Juno left Veji on the promise that a temple should be raised in her honor at Rome. Some years later the statues of divinities were permitted to be taken into captivity and placed in Assyrian temples; the hostile gods thus became prisoners of the gods of Nineveh.

If the declaration of war had its symbols and its ceremonies, so too

did peace compacts of the Romans. The method of bringing about the *fœdus ferire* had its conventions; the sacred vases, the place and the hour where the act of alliance was to be sealed with pledges, the form of the oath, the victim immolated in accordance with sacrificial rites — all these acts were the subject of strict regulation.

Such, then, is the lesson taught by history — the blending of magic and religious practice in fields actually appertaining to private, public and international law. As yet at this early epoch there were no rigid texts, no uniformity. It is only later that system, classification and organization appear.

It would be easy to multiply examples; each successive phase shows the influence of juridical institutions.

In the fourth century before the Christian era the greater part of Europe was under Celtic dominion. The Celts occupied, or to be exact, their warlike bands overran regions of boundless extent. To cite the words of an historian, they overran the world, sword in hand, and their expeditions covered three continents. In Asia, they founded the Kingdom of the Galatæ, in Europe they ruled supreme from Thrace to the ocean; their domain extended over the north of Italy, over the greater part of Spain, and over the British Isles; in Africa they threatened the existence of Carthage. Their expedition against Rome was victorious, and the Romans were obliged to have recourse to ransom in order to get rid of the invaders. Toward the middle of the third century before Christ, a portion of these vast lands threw off the Gallic dominion, which, however, still continued to exist in occidental Europe and in the British Isles.

In Gaul there existed brotherhoods which were associated with other brotherhoods in the British Isles. They included various kinds of affiliated societies, the Druids, the Bards, the Devins. Membership in these societies was acquired by examination. One of the functions of the Druids was the education of youth, another the administration of justice. Julius Cæsar said that the Druids took cognizance of nearly all public and private questions in dispute. Said he:

If any crime has been committed, any murder, or if any question is brought up with regard to inheritance or boundaries, it is they who de-

cide it; they impose penalties, and grant rewards of merit; if a private individual or magistrate fails to yield to their decision they forbid him the benefit of sacrifice. This penalty is the severest of all which they inflict; those on whom it is imposed are classed as impious and felons; they are shunned; all communication and intercourse with them is as much avoided as if their presence had a baleful influence; they can not apply to a court of justice nor can they attain public distinction.

Cesar, it seems, took upon himself the management of the national priests. At the time of the conquest human sacrifices took place in Gaul, but he does not appear to have ordered them suppressed. But Augustus took steps which were to have evil consequences for the Gallic cults. He announced that the exercise of the Druid religion was incompatible with the status of a citizen of Rome. Tiberius stood for a still more radical solution of the question. He instituted among the Druids a *senatus consult* which imposed upon magicians the same death penalty which was inflicted upon murderers and poisoners. Nevertheless the Druids did not completely vanish as a sect. Finally the Emperor Claudius ordered their proscription, and as a result a great number of them perished. Those who escaped fled to Britain and Ireland.

When Britain was conquered by the Romans, Druidism was concentrated in the southern portion of the country, and members of the sect were forced to take refuge in the northern part where St. Columba found it in existence, when after having founded the Monastery of Iona, he spread the Christian doctrine among the northern Piets. Druidism continued also to exist in Ireland, where, however, the texts make no mention of human sacrifices. In Ireland, which had escaped the Roman conquests, the Celtic spirit developed rapidly and yielded very slowly and in part only to the influence of Christianity. For more than a hundred and fifty years Druidism existed side by side with the teachings of Christian preachers. According to one tradition Christianity had been taught in Ireland ever since the first century of our era by priests who had come from Asia Minor. According to another version it commenced in the year 432, thanks to the apostolate of St. Patrick in connection with the Church of Ephesus. Moreover, the Irish Church preserved for many years

characteristics which give proof of its Asiatic origin: the excessive number of bishops, country bishops, or bishops for the rural districts, in opposition to the Church of Rome, which only allowed one bishop for each city. Asiatic custom was associated with the celebration of Easter, and the mode of administering baptism. Moreover, it applied to ecclesiastical functions the juridical notions of the clan: on the decease of the person vested with the duties of bishop or abbot, the clan to which he had belonged had the right to nominate his successor, and if at the time there was no person with the qualifications necessary for the position, the clan had the power, on the death of the stranger which it had been obliged to designate in his stead, to insist upon its inherent rights and obtain the corresponding appointment on behalf of one of its members who had finally become qualified to accept the duty of the office. The Irish law had certain characteristics more or less disconcerting to those who believed that law originates only in the forms in which it is seen to develop among nations who have reached a high stage of civilization. There did not exist, it is true, either legislative or judicial power; nevertheless juridical rules governed social relations, and judgments were rendered for the purpose of settling differences; these judgments were preserved and respected.

The Druids had disappeared from Ireland but the "brehons" and the "bards" still remained. The word "brehon" comes from a verb which means to *arbitrate*. In the law as administered by the "brehons" everything pointed toward forcing the adverse parties to submit to arbitration, by means of seizing their cattle and their effects, as a general rule, and by means of an enforced fast, when it came to dealing with persons called *named*, which means sacred — such as kings, nobles, priests, scholars and master-workmen. When the arbitration was completed, and the sentence pronounced, the last step had not been taken; the decision had yet to be enforced. Recourse was again had to forcible seizure; then followed a sanction of a special kind. He who refused to submit to the decision put himself in the place of forever refusing the protection of the "brehons," who went so far as to declare that "neither God nor man owed him any-

thing" and who thus in effect released all his creditors. Resistance was called "flight," and he who resisted was a "fugitive."

The "file" exercised the powers of the *brehons* or the arbitrators. "The *file*," wrote Henry d'Arbois de Jubainville, "are in Ireland jurisconsults, and by virtue thereof judges, legislators and lawyers. * * * They are tellers of tales. They relate in speech or song old war legends, deeds of arms, and tales of pomp and travel, which Ireland considers constitute her national history. * * * They are devins; by means of incantations, or magic formulæ they were able to impose upon a man certain rules of conduct and to make it impossible for him under pain of death to do such or such an action, whether inoffensive or commendable, from a moral standpoint."

It is to be observed that the arbitrator guilty of prevarication was subject to punishment. "When a *file* handed down a wicked sentence," says H. d'Arbois de Jubainville, "lumps ordinarily appeared upon his face, which constituted the visible signs of prevarication. * * * When in the midst of judges assembled Chanchobar Fachtna, the son of Sencha, pronounced an unjust judgment, if it was harvest time all the fruits of the earth where he was fell from the trees in one night; if it was at milking time, the cows refused to nourish their calves."

Some Christian preachers succeeded, but only in small numbers, in exercising an influence similar somewhat to that of the *file*; in any event it was, as a general rule, the *file* who succeeded in holding the confidence of the Irish inhabitants. That lasted for hundreds of years, and even in the seventeenth century, when the English conquest had been effected under circumstances of implacable cruelty, the *brehons* were at that time dispensing justice. A great poet, Edmund Spencer, who had belonged to the English administration and who had lived in Ireland for a number of years, had, in the vicinity of 1592, paid solemn tribute to the character of the *brehons* and praised the justice of their decisions. But soon the jurists of the conquering power took the offensive, and thus during the first years of the seventeenth century, Sir John Davies, Attorney-General for Ireland, denounced the Celtic juridical theories as tending towards the destruction of the public weal.

IV. THE THREE PHASES OF LAW

In the development of law there is to be found in almost all civilizations, a first phase, to wit, that of esotery, or the phase where the doctrine is generally kept secret, and confided solely to the initiated. In the second phase juridical rules are recognized and made public. In the third phase they are systematically expounded, and made the subject of commentary.

Moreover, juridical rules are not necessarily the subject of codification. They may be in the form of custom, which does not by any means signify that they are kept sealed. To give an example of one of the most interesting European civilizations — that of Iceland — let us state that before the diffusion of the written word, precedents and customs were confided to the memory of the Skalds, the singers and poets. During the pagan epoch of the Icelanders they played an important part in matters involving successions. When Christianity was introduced, the clergy, having a more or less extended knowledge of letters, dispensed with the services which up to that time had been rendered by the Skalds, and introduced the art of writing. In Iceland, as well as elsewhere, in Norway, in the Althing, at the assembly of delegates from all the freemen, laws were not only made but preserved. As a matter of fact, each year the announcer of laws, the Laghman, came to recite the laws. He was elected by the people; in case discussion arose it was his duty to state what the law was with regard to a particular case. The abrogation of laws was easily accomplished: if during three consecutive years the law had not been announced and if no protest was made, it was considered abolished. Not only were juridical rules preserved by means of oral tradition in this northern civilization; the sagas too were thus handed down from mouth to mouth.

Often in the history of law, collections of laws have been designated as "codes." The Roman codex was literally a collection of tablets, each of which had served its turn for inscription. We have stated in a former work how official collections were made at different periods. It may be added that the term "code" was given to these compilations whether they were cut in rock or engraved on metal.

In December, 1901, there was discovered at Susa the stone block on which Hammurabi, the Babylonian king, caused to be inscribed the provisions of public and private law, about the year 2000 before the Christian era. It is not known whether this monarch caused a number of transcriptions to be made, one of which may have been placed at Susa, the capital of the conquered province, or whether the block was transported as booty from Babylon in Elam, or, to use another name, Susiana.

In ancient India, the right of dealing out justice belonged to the entire tribe, which, generally speaking, exercised it through its "elders;" later, the chief of the tribe dispensed civil and penal justice, but his judicial authority soon passed to a great extent to persons learned in the law. At a later date, the Hindoo king is represented as taking part in the judicial hearings; competent men assisted him and acted as judges. The king condemns, precedents are invoked, and the strictest of all rules is that the law as it has been handed down shall not be changed.

There is a poem which expresses the first primitive notions of the origin of royal power, of order, and of law:

According to these ideas, royalty, through a divine ordinance, is the result of an after-thought on the part of the gods; men lived originally in an anarchic manner; at first there was neither king nor kingdom, nor punishment, nor one to inflict it; but when man's sense of justice was destroyed, then they laid hands on the property of others; this begot desire; desire passion; passion provoked a loss of all knowledge of duty; then perished the sense of right; the gods became frightened, they created law and order, till finally one man righting the uneven earth, brought the world into a state of order, blessed them by his protecting and directing power, and was thereupon, on account of his kindness, made king.

Juridical, moral, and religious ideas are mingled and interlaced with the juridical system of the Hindoos. At first their aim was a simple and practical one: to render each man secure with regard to what belonged to him, and to prevent rapine. According to one poem, the absence of law would be disastrous in its consequences: "Women could be stolen; people would devour each other like fishes. This was," it is added, "the state of the world before Mance was made

king; previous to his arrival people had tried to make laws for themselves; the laws were: 'a boaster, a bully, an adulterer, a thief must be banished;' but no one enforced these rules, and the people were miserable and asked for a king."

At a more advanced period the words of Leist, in his "*Alt-arisches Jus gentium*," are applicable, to wit, that the ancient Ayran law is founded on the belief in gods who protect *das Recht* and punish *das Unrecht*.

Rudolph von Jhering states that he has searched this epoch in the history of India in vain for an expression of the exact equivalent of *law*, or even the rudiments of the separation brought about from the very beginning in the Roman law between divine and human law, or between law and religion. This means to the jurist that the exact nature of law had not yet been recognized. During the historic epoch, the law of ancient India was essentially based on custom; to tell the truth, there were few, if any royal ordinances; kings recognized the limits of their power in tribal and local rules and in institutions. Moreover, it must be pointed out that the force of the Hindoo law was, above all, in itself, automatic, and the scope of such a sanction becomes apparent if one considers that marriage by abduction and by fraud was abandoned, not because of penalties or condemnations, but simply because the idea was introduced that, of the various modes of marriage — and there were as many as eight — the best and most dignified was the marriage in which the father gave his daughter away; inferior methods met with disfavor, and ended in comparative if not in total disuse.

The Hindoo customs have been compiled. As many as eighteen compilers have been mentioned who have been honored with the title of "legislators," and there were besides numerous commentators. One of the principal compilations is the *Book of Laws of Manou*; it is itself an off-shoot of an ancient compilation drawn up by the Vedic school, probably made towards the commencement of the sixth century before our era. At the beginning of the work, Manou, the father of mankind, is seen expressing his willingness to set out in detail to the *rishis*, in accordance with their request, the law of the

four castes. After having outlined a sort of cosmography in the first verses, he allows the sage Brignon, who has learned from his lips the book which Brahma has revealed to him, to continue in his stead. The compilation is a recognition of the power of the priesthood. It relates the punishment of the impious kings, and advocates respect to the clergy on the part of all. This code, like all Hindoo compilations, is far more comprehensive than modern legislative collections. As we have already said, moral precept is intermingled with juridical rule; it contains, even, maxims of etiquette and hygiene.

Elisée Reclus has set out, in his admirable style, the historic part played by Asia Minor. He says:

It is there that, inspired by Hellenic genius, this marvelous elaboration of all the elements of art, of science, of civilization, coming from Chaldea, from Assyria and Persia, from the Semetic world, and even indirectly from Egypt was put into play; they set all these foreign materials at work, and it is through them that this new acquisition was transmitted to their brothers by race in the islands of the Archipelago and on the continental coasts of Greece * * *. The Ionian civilization was the springtime of Greek civilization; the form it was which gave us the "primeurs" * * *. Asia is the land of Homer, of Thalys, of Heraclitus, of Pythagoras, and of Herodotus. Only, while in European Greece the light of genius seems to have been concentrated in Athens, it shone brightly amidst the numerous homes on the coasts of Asia Minor, Pergamo, Smyrna, Ephesus, Miletus, and Halicarnassus.

In these Hellenic centers of Asia, as in the states of Greece, juridical rules were drawn up and published; inscribed upon tablets of marble and brass, their precepts were open to the information of all. According to the statement of Sir Henry Sumner Maine, this phenomenon is observable at about the same period in the development of each community.

Is it necessary to call attention to the juridical history of Rome? We shall refer only to what is known as the Law of the Twelve Tables. As the eminent French scholar, Edouard Lambert, has said, it is generally admitted "that it marked the era of a formation founded purely on the custom of the Roman law, and that the majority of its provisions only served to perpetuate in writing rules which had already been accepted in practice without any intervention of the legislator."

The historical examples which we have just compiled and placed before the reader, examples which it would be easy to multiply, allow one conclusion to be drawn. It was not in a clear, precise, determined, and, if the word may be used, permanent form in which juridical rules first made their appearance. Law is not the creature of legislators; law even antecedes custom. The whole history of private law in its first period of development proves this to a demonstration, and the same is the case regarding public law and the law of nations.

V. THE CONCEPTION OF A SANCTION

Philosophers and theologians have seen fit to evolve theories even with regard to principles of law. Thus, the theological school asserts that the knowledge communicated to men by God is based on legal principle, while the partisans of secularization who were desirous of eliminating the religious element from all juridical rules opposed this view. Even at the commencement of the seventeenth century William Ockam, Marsile de Padoue, Jean de Jandun, took this stand in the struggle between the Emperor and the Pope. According to Grotius, the source of law is constant and permanent; it is the tendency to social intercourse inborn in mankind — judgment based on reason, which is the innate characteristic of the human mind. Emmanuel Kant enunciated the doctrine that the end and purpose of the law is liberty. He took the view that every act which makes it possible for every man in the exercise of his natural freedom of action to place himself in accord with the freedom of action of all men is in conformity with the law, that is to say, is just; but every act which can not be reconciled with general liberty of action is a blow aimed against the law, and is unjust. He adds, "It is true that the idea of law includes the power to restrain. The latter," he says, "is a necessary result of law; as long as the system based on freedom of action is in conformity with the universal freedom of all it follows that it must be just, and that everything which opposes that common liberty is for the same reason unjust, and resistance opposed to this obstacle is in accordance with the principles of common liberty and is just."

The theory of John Austin deserves comment in connection with those hitherto enunciated. In his opinion the substance of jurisprudence is positive law, in other words, law established by political superiors for political inferiors, and its essential characteristics are, as we have seen, the authority to command, which in turn is the expression of a desire, and, in addition to that, a sanction, that is to say, the disagreeable consequences which will probably be met if the command is disobeyed.

The conception of a sanction as indispensable to the conception of law is worthy of examination. In order for juridical regulations to exist a penalty to be imposed upon the offender must also be provided. In the absence of the existence of such a penalty can it be said that there is no such thing as juridical regulation? The reply must be in the negative. As we have already had cause to remark, law exists not only in the absence of sanction, but even when it is crushed under foot. In every-day life and elsewhere the intervention of sanction is the exception and not the rule. Every moment thousands and thousands of juridical acts go on in the life of the individual without his considering whether or not failure on his part to carry out his obligations will result in punishment. Certain juridical institutions have long existed without the power of enforcement. Such is the case of barter and exchange, or, in other words, the delivery of one thing for its equivalent. As a commutative contract barter has its place amongst savages, wild tribes and civilized peoples. Moreover, it happens frequently in civilized communities that jurists differ amongst themselves with regard to the means which should be employed for its judicial enforcement.

We have already stated that sanction in the sense of coercive force is often lacking in constitutional law. In the majority of countries there is no institution charged with enforcing the terms of the fundamental pact, and it thus happens that laws in conflict with the constitution must be applied by the courts. James Bryce made the following observation:

The Crown is now in England bound by statute to summon parliament, but should the Crown omit to do so, parliament could not legally

meet of itself, save that upon the demise of the Crown, it does forthwith come together to swear allegiance to the new sovereign.

Sanction has on occasion been forestalled. Thus it was that in France the Constitution of the year VIII made the *senat conservateur* guardian of the Constitution and imposed upon it the duty of sustaining or annulling all acts which should be submitted to it on the question of constitutionality, by the tribunate or by the government, and to pass upon the constitutionality of the decrees of the legislative body. In the United States of America in the court of last resort, the judicial power passes upon the constitutionality of laws enacted by the several States or by the general government, whenever they may bring up judicial questions. The same is true with regard to the constitutional law of the federal republics of America, such as the United States of Mexico or of Brazil, and other countries.

VI. CUSTOM IN THE THREE FIELDS OF LAW

In the field of private law the law continues, even at this day, to be expressed in the form of custom as well as in that of law. There are still many nations with whom custom is a juridical source more fertile even than the law, that is, nations who up to the present time have not turned, or are turning but slowly to the written law. To a great extent law appears in the guise of custom in the constitutional field of powerful nations. That is the case in England. Their constitution is for the most part unwritten. It may be interesting to note that Oliver Cromwell drew up the *Instrument of Government*, the first modern constitution reduced to writing. Among political writers the idea of the written constitution found strong adherents in the eighteenth century. When the English colonies in America proclaimed their independence, some of them drew up constitutions. They did so at the request of the Philadelphia Congress issued on May 15, 1776, in its capacity as the representative of the colonies which had determined to bring about a separation from the mother-country. Hence, between 1776 and 1780, the constitutions of Virginia and five other States. In the domain of international law the generative force of custom continued to develop, although the con-

tractual tendency manifested by treaties, and above all, by general treaties, in other words, the public expression of the collective will, has often taken its place in more modern times.

In the middle ages, jurists made a distinction between *usus* and *consuetudo*. "*Usus sonat factum*," says Lopez in his annotations of the *Siete Partidas*, "*consuetudo id est quod oritur ex dictis et factis, quæ homines populi dicunt et faciunt, sequuntur que continuatim, longi temporis spatio, metu vel coactione aliqua non interveniente*." But different ideas have been entertained regarding the value of custom. Some writers hold that custom is as authoritative a source as the law itself, while others are of the opinion that it should be relegated to a lower rank. According to the latter, true juridical rules consist of actual written formulas. Only when law is actually drawn up and promulgated as such does it amount to an authoritative expression; and even custom, in order to contain the force of juridical rules, must fulfil certain conditions which make it apparent that it is the result of forethought, the subject of general acceptance, and in conformity with reason. In canonical law these conditions have been expressed as such ever since the twelfth century; at the end of that century glossarists, and later commentators adopted the opinion of the canonists on this point.

The Church had found itself obliged to recognize the legitimacy of custom. It was scarcely in a position to legislate; or, perhaps, it would be better to say that the exercise of the power of legislation had become extremely difficult as far as it was concerned. The fathers of the Church recognized that a number of rules could be justified only on the ground of custom — such as making the sign of the cross, offering up certain prayers, and facing toward the East. But when the Church became autonomous and in a position to exercise legislative power, it itself, or rather the canonists, assumed an attitude hostile to custom; they insisted that custom should be of long duration, that it should be based on reason, that it should be in conformity with rules formally promulgated by an authoritative source, and that the tacit consent of the authorities should have been obtained. One question in particular was agitated, to wit, that of

determining whether custom ought not to be recognized as such by a judgment rendered on debate. The question was decided in diverse ways, although the majority of the writers on the subject asserted the uselessness of judicial recognition.

We have just seen that in the field of public law custom has preserved its importance in a number of countries. As far as relates to the law of nations, and from the very beginning thereof, are to be found indications analogous to those which we have met in discussing private law. It was the conception of the risk of punishment falling upon the transgressor which at first constituted the safeguard of heralds and ambassadors. The *Book of Laws of Manou* contains the following maxim: "He who strikes an ambassador rushes on to his own loss and destruction." Even in the heroic era Greece recognized the sacred character of hostile heralds. At Rome the greatest respect was shown to ambassadors; according to Denys of Hali-carnassus, they were regarded with the same veneration which was accorded to the priesthood. A maxim of the Koran states that an envoy should receive nothing but good and open treatment. The celebrated canonical compilation of the twelfth century, the *Decree of Gratian*, protects ambassadors under the threat of excommunication. When the jurists of the Middle Ages began to study questions concerning the intercourse of nations and their dealings with one another they were unanimous in reaching the conclusion that ambassadors had the right to the safety of the road — "*securitas viæ*." The text called attention to the fact that should any person throw obstacles in the path of the mission of the envoy, either of a friendly or of a hostile power, he would be subject to excommunication under the canonical law, whereas under the civil law he would be delivered to the enemy to be sold into slavery. It said that an injury done to an ambassador was an injury done to the prince who sent him. Alphonse X, following the Roman law, formally declared in the *Siete Partidas* that every ambassador coming to Castile, whether Christian or Mahommedan, was to come in safety; that no one might do him harm either in person or property. In one text of the canonical law selected from a compilation made by Saint-Isidore de Seville,

who himself had borrowed from Ulpian, mention was made of the religious obligation not to do violence to envoys, and that this obligation constituted a part of the law of nations: "*Jus gentium est legatorum non violandorum religio.*" Citing, with some slight modification, the words of the Roman lawyer Pomponius, Angelus de Ubaldis maintained that ambassadors were held to be sacred — "*legati dicuntur sancti.*" So insistently did the authorities attribute the religious character to ambassadors, that those who offered them injury were held guilty of sacrilege: "*Legati appellantur sancti, infredientes eis injurias incidunt sacrilegio.*" Thus did inviolability, one of the two great prerogatives of public ministers, become affirmed; and this, according to one writer, means the most absolute and complete exemption, the right to the most vigilant and effective protection. At the commencement of the seventeenth century, Jean Hotman, the author of the treatise *The Duty and the Dignity of Ambassadors*, said:

With regard to his person, it is common knowledge that by law both human and divine, even amongst barbarous nations and in the midst of arms and enemies in arms, the person of the ambassador has been at all times held sacred and inviolable. The penalty inflicted upon those who injure them has been at all times most severe. This law has come to be proverbial, namely, that an ambassador is always exempt from any outrage and any harm. * * * And when men have not inflicted punishment it has been seen from century to century that God has not allowed this crime to go unpunished; and in witness hereof, observe the destruction of Carthage, of Tyre, of Thebes, of Corinth, and of so many other states, and even entire provinces and kingdoms.

The sea has played a prominent part in the history of humanity. Three-fourths of the area of the globe are covered by its waves. Not only does the ocean exercise a beneficent influence on the general economy of the planet, but as a field of action it guarantees to enterprising nations supremacy and preponderant influence. It would be possible to write a history of the sea, or rather of that which has occurred upon the sea, and to call particular attention to the juridical institutions which have to do particularly with matters oceanic. Maritime law includes in its broadest conception all relations which arise by virtue of the sea. It constitutes a branch of general com-

mercial law, and at the same time is based upon the law of nations. While many of the institutions of maritime law are relatively recent, some, on the contrary, are of great age; and almost all are peculiar in that they constitute in effect the application to naval transactions of rules originating or put into practice on land. They are in a sense a continuation of "terrestrial" institutions. This is admitted in private maritime law. Uniformity, which is a characteristic of this law, owes this feature to its field of action, to wit, the ocean, which is everywhere the same. A French jurist, Fremery, has said that those who navigate the sea constitute an individual people just as do those who deal in trade and barter upon the land. Says he: "They occupy this vast heritage in common, and they glean in freedom its fertile yield." He calls them "a nation" which gathers within its bosom classes drawn from all the people of the world.

By virtue of its origin maritime law is based on custom. The great international conventions dealing with this law are of recent date. For centuries there was no law-giver, and when legislative acts came into existence they were simply declaratory of customs regularly observed. Some of these provisions have a curious origin. James Lorimer cites the custom of the desert in connection with this subject. From time immemorial groups of merchants have crossed deserts. Usages grew up regarding the respective rights and duties of those who formed a portion of these caravans, and amongst these usages is to be found the custom of determining the liability of those whose effects have been preserved in order to indemnify those whose goods had been sacrificed by way of jettison. A like rule is to be found with regard to mercantile operations by sea. "The *lex Rhodia de jactu*," says the author we have just mentioned, "which the Romans borrowed from the Phœnicians, is now in general observance amongst the tribes of the Sahara, as the customary mode of distributing the losses incurred by caravans crossing the desert, between the company owning the camels, or what in railway language would be called the plant, and the passengers or owners of goods. The *Khodja* or scribe acts as a supercargo and is said to be quite conversant with the distinctions between general and special average." The Sahara —

that is the Desert in a pre-eminent sense has been described, in 1895, by A. H. Keane. The strictly desert zone is 2,386,000 square miles, with a sporadic population of 1,400,000. Says Keane:

In the whole of the Sahara proper there is not a single carriage road, not a mile of navigable water, not a wheeled vehicle, canoe or boat of any kind. There are scarcely even any beaten tracks, for most of the routes though followed for ages without divergence to right or left, are temporarily effaced with every sandstorm, and recovered only by means of the permanent landmarks — wells, prominent dunes, a solitary eminence crowned with a solitary bust, or else a line of bleached human and animal bones, the remains of travelers, slaves, or camels that may have perished of thirst or exhaustion between the stations. Few venture to travel alone, or even in small parties which could offer little resistance to the bands of marauders hovering about all the main lines of traffic. Hence the caravans usually comprise hundreds or even thousands of men or animals all under a *Kebir* or guide, whose word is law, like that of the skipper at sea. Under him are assistants, armed escorts and scouts, to spy out the land in dangerous neighbourhoods, besides notaries to record contracts and agreements, sometimes even public criers and an *imân*, to recite the prescribed prayers to the faithful.

The French writer, Raymond Thomassy, holding that both in the case of caravans and merchant ships, journeys are made in but one bottom, "*sillage*," whether across the desert or across the sea, says that in either case, the conditions arising from isolation or protection from hostile attack are identical. As a matter of fact the organization of the land journeys of the caravans was like that of the sea-voyage of the merchant ship before the great changes brought about in ocean traffic at the time of the crusades. During the period of antiquity and the first half of the Middle Ages, traders embarked with their wares and sailed from port to port in the company of the owner of the vessel. Operations by caravan were carried on along analogous lines.

Regarding the development of juridical institutions of the sea through custom, a striking example is afforded by the case of the Mediterranean. Carl Ritter, the famous geographer, designates the following as the triple period of civilization: the three epochs of fluvial, Mediterranean and oceanic civilization. The Mediterranean era lasted for nearly twenty-three centuries. Beginning about the

year 800 before our era, when the Phœnicians, already long established on the eastern coast of the Mediterranean, succeeded in founding their factories on the shores and in the islands of the great interior sea. The era came to an end when at the end of the fifteenth century the geographical discoveries of that period changed the center of activity, and inaugurated the beginning of the Oceanic epoch. In the last centuries of the Middle Ages, that beautiful and progressive civilization at the head of which were the Italian states, Norman Sicily, the states of the French Mediterranean, and Spanish towns such as Barcelona, declined. In the principle ports maritime law appeared in the form of juridical rules which arose from marine and commercial usages, solidifying first through force of oral tradition, then taking on the form of digests of judicial decisions, or even regulations, stating generally that their text was no more than a simple codification of rules which existed already in fact.

In the formation of these juridical rules of the sea the maritime guilds of the different cities played an important part. The guild of maritime commerce was an association of all those interested in commercial maritime dealings. In various cities the guild takes the name of *ordo maris*, in others that of *curia maritima*, in documents drawn up in Latin. Men became members of the *ordo* or of the *curia maritima*; the members entered under oath; and magistrates were appointed by the guild, who were known by the historical name of consuls. They watched over the security of property on the sea; and insisted that the commanders of armed vessels pledge themselves under oath to do no injury to friends of the city, and give a guaranty against the commission of transgressions. If an injury were committed against friends the consul took up the question of punishing the offenders. Consular decisions were soon compiled, and those works, known as the *Book of the Consulates*, appeared; in other words collections of the judgments rendered by the Consular Tribunals. The Consulates appear to have been Italian in origin. It seems that in the controversy between Pisa and Barcelona with regard to the precedence of their guild and consular court, a decision in favor of Pisa was rendered. However that may be, the real document par

excellence of the middle ages was the *Consolat del Mar* of Barcelona. In the thirteenth century, the Catalogue had shown considerable commercial development in almost all the ports of the Mediterranean. At this time, Montpellier in the French Mediterranean was under the scepter of the House of Aragon. It was a great commercial city but exceeded in importance by Barcelona. During the long reign of Jayme, the first king of Aragon, Barcelona had received important privileges; she had obtained on behalf of her citizens the management of the municipal interests. Maritime differences were necessarily destined to invite the attention of competent men, or *probi homines*, as was said, who gave judgment. These judgments were preserved by means of oral records. Finally they were committed to writing, and when printing had been introduced in Spain, one of the first works struck off was the *Consolat del Mar*.

Amongst the ancient collections of decisions and regulations, the *tabula amalfitana*, which originated in the maritime court of Amalfi, plays a prominent part, as does the *ordinamenta et consuetudo maris*, a compilation of the decisions of the consuls and of the body corporate of the seamen of Tranci, which, it is said, dates back to the year 1063. There is also the *capitulare nauticum*, a revision made at Venice of a still older compilation; and the *constitutum usus*, and the *breve curiæ maris* of Pisa. As a matter of fact their origin was always in custom. If public authority intervened it was simply for the purpose of showing that judicial decisions or customs were such or such. Two compilations were finally recognized as authoritative: the *Consolat del Mar* of Barcelona, which contained the jurisprudence of the *probi homines* sitting in the maritime court of Barcelona, and the so-called *Ley Oleyroun*, or the rules of the island of Oleron. The *Consolat* was recognized over the greater part of the Mediterranean. The Rules of Oleron were observed to a certain extent on the Mediterranean but their effect was above all felt on the Atlantic, and over the northern seas, where three distinct juridical bodies of law came into being: the law of Oleron, as such, the Flemish maritime law, and the Law of Wisby. The *Consolat del Mar* had above all for its purpose the settlement of private disputes arising in con-

nection with commerce and navigation. It deals chiefly with rules applicable in time of war, to vessels and cargoes of enemy subjects, and to vessels and cargoes of "friendly subjects," as it says — neutral subjects, as we would say to-day. The provisions applicable to these special conditions were for many years accepted as rules of naval warfare. Some maritime Powers denied their force, while others steadily recognized them; and thus simple rules originating in the sentences of the *probi homines* of a southern city constituted for centuries the law of nations who were struggling for mastery of the sea.

It would be easy to furnish an abundance of proof and an abundance of cases, but let us limit ourselves to a statement of the propositions which no student of the history of law will deny: custom is invariably at the bottom of maritime institutions and rules. This is true both as regards private law and the maritime law of nations, both in time of peace and in time of war.

ERNEST NYS.

[TO BE CONTINUED.]

HISTORY OF INTERNATIONAL LAW SINCE THE PEACE OF WESTPHALIA

The main factors in the growth of the science of international law

The treaties of Münster and Osnabrück gave to Europe a sort of international constitution which remained the basis of its public law down to the French Revolution. But it would be a serious error to assume that the international community of states as revealed to the world by the Peace of Westphalia implied the recognition of the science of international law as understood and practiced by the society of nations at the present time. The science of international law as it exists today is a result of slow historical growth and is the product of two main factors, *viz.*, certain theories or principles on the one hand, and international practice or custom on the other. The relative value and influence of the contributions of each of these factors is so difficult to determine that they have never been thoroughly sifted or separated — a task left for the future historians of international law.

The importance of jurists and publicists

It is clear, however, that during its formative period, international law was mainly developed by great thinkers and jurists who were forced to rely upon the weight of general ideas or theoretical considerations rather than upon any satisfactory body of accumulated custom if they desired to ameliorate conditions or improve international relations. The fundamental principles of the science once firmly established and recognized in international practice, there was less need for theoretical discussion. It now became the main function of the jurist and publicist to apply and interpret the law in conformity with the best and most authoritative precedents or usages.

Grotius as the founder of the science of international law

The founder of the science of international law was Hugo Grotius, whose main work, entitled *De jure belli ac pacis*, published in 1625

during the midst of the horrors of the Thirty Years' War, marks an epoch in the history of civilization as well as of international law. Although it was based largely upon the labors of his predecessors¹ to whom somewhat scant recognition is given by him, Grotius deserves his title of "Father of International Law" from the fact that his was the only work which obtained wide circulation and general recognition² in the seventeenth century. This was because it answered the needs of the time, and was the fullest, most attractive, systematic and scholarly exposition of the subject hitherto attempted. Grotius brought to his work great learning, enthusiasm, experience, and a passion for justice which won for him the hearts as well as the heads of his contemporaries and of posterity.

This work based on the jus naturale

Like his predecessors and many of his successors, Grotius started from the idea of a universal and immutable law of nature (*ius naturale*) based upon right reason and human sociability — a philosophical conception derived from the Stóicé philosophers of antiquity which has dominated ethics and jurisprudence until recent times. He claimed for the law of nations the authority and sanction

¹ For references and a brief sketch of the "Forerunners of Grotius," see note at the end of this article.

² This is shown by the facts that at least forty-five Latin editions of his book were issued prior to 1748 and that it had been translated into the leading modern languages before the close of the seventeenth century. See Rivier in 1 Holtzendorff, *Handbuch*, § 88, for list of editions. It made such a great impression upon Gustavus Adolphus that he is said to have slept with the work under his pillow during his campaigns in Germany.

Grotius was born at Delft, Holland, in 1583. As a child he was a prodigy, writing Latin verses at nine years of age. He entered the University of Leyden when twelve years old and took his degree of Doctor of Laws at Orleans, France, at the age of fifteen. As a result of religious controversy, he was sentenced to imprisonment for life in 1619; but in 1621 he succeeded in escaping from prison, and lived for ten years in Paris where he composed and published his great work in 1623-25. In 1634 he was appointed Swedish minister to France — a position which he held until the year of his death in 1645. Grotius was poet, philologist, philosopher, historian and mathematician, as well as diplomatist, lawyer and jurist.

of this law of nature — a doctrine denied by no one in his day," thus giving it an apparently solid, binding and rational character which few cared to dispute. Moreover, he fortified his position by an attractive style and a marvellous display of erudition or citation of authorities from men of all ages and countries (including the Bible, poets, orators, philosophers and historians, as well as jurists) which went far to enhance his authority in the eyes of his contemporaries. He also borrowed largely from the Roman *jus gentium*, the leading principles of which had been practically identified with those of the *jus naturale*. This "written reason," as the Roman Civil Law has been called, not only commanded the highest respect from its origin, but was sanctioned by general agreement, at least on the part of the educated classes; and Grotius thus relied upon positive law (*jus voluntarium*) as determined by general consent as well as upon the law of nature to give effect to the principles and usages of the law of nations.

The fundamental principles underlying the Grotian system

Many of the principles laid down and usages sanctioned by Grotius are obsolete; others are found only in germ or are incompletely developed; many present-day laws and customs (as *e. g.*, those making up the modern law of neutrality) were practically overlooked or received scant recognition from him; but the essential principles underlying the Grotian system remain the fundamental principles of international law. Such are the doctrines of the legal equality and territorial sovereignty or independence of states.⁴

These fundamental principles, though not clearly stated by Grotius, underlay his system and were fully developed by his suc-

³ For references on the *jus naturale*, see note at the end of this article.

⁴ The best recent estimates of Grotius' work are by Basdevant in *Les fondateurs de droit int.*, ed. by Pillet; Andrew White in *Seven Statesmen* (1910), 54-110; and Walker, *Science, etc.*, ch. 4.

For a very full analysis of the *jure belli ac pacis*, see Walker, *History*, §§ 143-148. The best modern translation is by Pradier-Fodéré (1867). It is preceded by a valuable biographical and historical essay.

cessors, more especially by Wolff, Vattel, and G. F. de Martens. They were the inevitable outcome of the acceptance of the dogma of the supreme power or sovereignty of states and princes as defined by Bodin, Grotius, Hobbes, and other political philosophers during the sixteenth and seventeenth centuries.⁵

It only remained to apply this dogma to the international relations of the community of states recognized by the Peace of Westphalia. It was soon seen that if states and princes are sovereign and independent, they must also be regarded as equal before the law; and that it was necessary to formulate a doctrine of the fundamental rights and duties of states.

The successors of Grotius

The successors of Grotius, who wrote during the seventeenth and eighteenth centuries, may be divided into three schools—the “philosophical” or pure law of nature school, the “positivists” or historical school, and the “eclectics” or “Grotians.”

The pure law of nature school

The pure law of nature school, headed by Pufendorf (1632-94), denied the existence of any positive international law based on custom and treaties, and maintained that the law of nations is wholly a part of the law of nature.⁶ Pufendorf occupied the first chair which was

⁵ Though differing widely from the latter, both in point of view and details, Grotius (*lib. I, ch. 3, § 7*) practically follows Bodin, who defines sovereignty as “supreme power over citizens and subjects, unrestrained by the laws.” Dunning, *Political Theories from Luther to Montesquieu*, pp. 96 and 181. Bodin’s great work *De Republica* was first published in 1576. Grotius has been severely criticised for his defense of the patrimonial state and his repudiation of the doctrine of popular sovereignty; but these views doubtless served to recommend his opinions to the absolute monarchs of his day.

⁶ *De jure natura et gentium*, II, ch. 3, § 22. On this point Pufendorf followed Hobbes (*De Cive*, XIV, 4), who divided natural law into a “Natural Law of Men and a Natural Law of States,” and maintained that the two were composed of identical precepts. In other words, states live in a state of nature in respect to each other. But Hobbes and Pufendorf differed widely in their views as to the sociable nature of man. Pufendorf, however, adopted Hobbes’ imperative view of the nature of law.

founded for the study of the law of nature and nations at a university (at Heidelberg, Germany, in 1661), but his *magnum opus* on *De jure naturæ et gentium* was not published before 1672 when he held the position of professor of jurisprudence at the University of Lund, in Sweden. His great service was his insistence upon the supreme importance of natural law at a time when customary law based on good usages was insufficiently developed.⁷

Pufendorf's most famous disciple was Thomasius⁸ (1655-1728), a German philosopher who published his *Fundamenta juris naturæ et gentium* in 1705. Thomasius distinguished between perfect and imperfect duties — a distinction afterwards elaborated by Wolff.⁹ Other important "naturalists" of the seventeenth and eighteenth centuries were: Barbeyrac (1674-1744), the famous French translator and commentator of the works of Grotius, Pufendorf and others; the Genevan Burlamaqui (1694-1748), whose *Principes du droit naturel et politique* was published in 1747; Thomas Rutherford who published his *Institutes of Natural Law* in 1754; and the French diplomatist De Rayneval (1736-1812), author of the *Institutions de droit de la nature et de gens*.¹⁰

The positive or historical school

The positive or historical school of international jurists, while not denying the existence and validity of the law of nature, emphasized the importance of custom and treaties as sources of international law. This school may be said to have originated in England where it has also attained its fullest development. One of Grotius' predecessors,

⁷ The only parts of his work which deal with international law proper are the last five chapters of the eighth book.

⁸ On Thomasius, see especially Andrew White in *Seven Great Statesmen* (1910), 113-61.

⁹ Westlake, *Chapters*, p. 72.

¹⁰ A belated pure "naturalist" has even appeared during the latter half of the nineteenth century — the Scotch professor Lorimer. He still defines the law of nations as the "law of nature realized in the relations of separate nations" or "political communities." See his *Institutes of the Law of Nations* (1883), I, pp. 1 and 19.

the Italian Gentilis, who was appointed professor of civil law at Oxford in 1588, and whose chief work *De jure belli* was published in 1598, may in a sense be said to have been the founder of this school. At least he enriched his work with examples drawn from contemporary opinion and events — a practice which Grotius condemned — and he preferred historical investigation to abstract reasoning and systematic exposition.

Other representatives of this school in England during the seventeenth century were: the learned Selden¹¹ who, in a work entitled *Mare Clausum* (published in 1635), attacked Grotius' views on the freedom of the sea as expressed in the latter's *Mare Liberum* (published in 1609); Zouch (1590–1660), professor of civil law at Oxford and judge of the Admiralty Court, who published the first *manual* of international law in 1650;¹² and Sir Leoline Jenkins, Zouch's successor as admiralty judge, whose opinions on questions of prize law are of great importance in the history of international maritime law.¹³

The three leading positivists of the eighteenth century were the famous Dutch jurist Bynkershoek and the German professors John Jacob Moser and G. F. von Martens.

Bynkershoek never wrote a treatise on international law, but he still ranks as one of its leading authorities.¹⁴ Although he recognizes reason as an important source of the law of nations, he relies mainly

¹¹ In 1640 Selden also recognized the importance of a positive law of nations in a work on *Law of Nature and Nations among the Hebrews*.

¹² The influence of Zouch in England was very great. He was also the first publicist to use the term *jus inter gentes* in the title of his work; but he was not the inventor of this phrase, as generally stated. Victoria (see note at the end of this article) had employed it in the first half of the sixteenth century, and Grotius had made use of the phrase *jus inter civitates*, although the latter generally employed the ambiguous term *jus gentium*.

¹³ It should not be forgotten that Germany also produced several representatives of the positive or historical school during the seventeenth century. Of these the most important was Rachel, who published two dissertations on *De jure naturæ et gentium* in 1676.

¹⁴ The fame of Bynkershoek rests upon three books: *De dominio maris* (1702); *De foro legatorum* (1721); *Questiones juris publici* (1737). Wheaton (*History*, p. 193) says that Bynkershoek was "the first writer who has entered into a

upon custom, as expressed in treaties and international practice (including unilateral acts) for actual guidance.

John Jacob Moser (1701-1785) was the author of innumerable works bearing mainly on international law,¹⁵ which are perfect store-houses of historical facts and precedents. Moser was a thorough-going positivist, and his attitude toward the law of nature is one either of indifference or of contempt.

G. F. von Martens (1756-1821) also published numerous works dealing with positive international law, the most important of which was entitled *Précis du droit des gens moderne de l'Europe*, published in 1788. This work, which appeared in successive editions and has been translated into many languages,¹⁶ has exercised a great influence upon international practice and the subsequent development of international law. Von Martens does not wholly repudiate the law of nature, based on reason and utility, but he admits it only in default of positive rules founded on usage and treaties. As the first systematic manuel on positive international law more or less adapted to modern needs, it became a model and still enjoys considerable reputation. G. F. von Martens is especially clear in his exposition of the fundamental rights and duties of states.¹⁷

critical and systematic exposition of the Law of Nations on the subject of maritime commerce between neutral and belligerent nations."

¹⁵ Nys (1 *Droit Int.*, p. 257) states that in 1765 Moser had already composed 200 works and studies. His principal work, entitled *Versuch des Neusten Europäischen Völkerrechts in Friedens und Kriegszeiten* in ten volumes, was completed in 1780. It is said by Wheaton (*History*, p. 323) to contain a rich mine of materials. For a list of his principal works on international law, see Wheaton, pp. 324-25; and Rivier in 1 Holtzendorff's *Handbuch*, § 102.

¹⁶ An English translation by Cobbett was published at Philadelphia in 1795. The best and most recent edition, with notes by Pinheiro-Ferreira and Vergé, appeared at Paris in 1864. Von Martens also began the celebrated collection of treaties which bears his name and which has been continued up to our own time. G. F. von Martens must not be confused with his nephew Charles de Martens, the author of the *Causes célèbres de droit des gens* (1827) and the *Guide diplomatique* (1832) or with the famous Russian jurist and publicist F. de Martens of our own day.

¹⁷ See his *Précis*, liv. IV.

The "eclectics" or "Grotians"

A third school of international jurists — the "eclectics" or "Grotians" — occupy a middle ground between the "naturalists" and "positivists." The members of this school followed in the footsteps of Grotius in preserving the distinction between the law of nature and the positive or voluntary law of nations, based on custom or consent; but, unlike their master, they have treated both as about equally important.

The greatest representatives of this school in the eighteenth century were the German philosopher Wolff (1679-1754) and his Swiss disciple Vattel (1714-67).

Wolff's greatest work in this field was a treatise on the *jus naturæ* (1740-48) in eight volumes. To this was added a volume on the *jus gentium* in 1749 and an abridgment of the whole entitled *Institutiones juris naturæ et gentium* in 1750. Wolff's highly abstract and mathematical treatment of these subjects rendered his works practically unintelligible to those who might otherwise have profited by them.

The task of introducing Wolff's ideas to men of letters, statesmen and diplomatists was undertaken by Vattel, the famous Swiss publicist, whose influence on the conduct of international relations is perhaps second only to that of Grotius. Vattel tells us in the preface of his *Law of Nations*¹⁸ that he had at first intended only to "clothe" certain portions of Wolff's system "in a more agreeable dress," but he soon found it necessary to compose a very different work. He, therefore, contented himself with "selecting from the work of M. Wolfius the best parts, especially the definitions and general principles." His book, though by no means an original contribution to the subject, is, indeed, far from being the mere abridgment or paraphrase of Wolff's treatise on the *jus gentium* that it is often represented. He accepts Wolff's doctrine of perfect and imperfect

¹⁸ This famous work, which was published in 1758, bears the additional title: *Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*. It has had many editions and translations. The most complete and recent edition, with notes *variorum*, is that edited by Pradier-Fodéré in 1863.

obligations, and emphasizes the fundamental rights and duties of states. He also adopts his master's complicated and impractical division of positive international law into the voluntary, customary, and conventional law of nations;¹⁹ but he rejects the Wolfian fiction of a world state or *civitas maxima* as a foundation for the voluntary law of nations. Vattel wrote in an attractive style and enriched his work with illustrations drawn from the history of his own times.²⁰

The period between 1648-1713

The period between 1648 and the Peace of Utrecht (1713) was marked by the aggressive policy of Louis XIV, resulting in a series of wars and conquests and a disturbance of the balance of power in Europe created by the Peace of Westphalia. This in turn led to the formation of the first great European coalition against France headed by England in 1688 — a date which also marks the beginning of what Seeley²¹ calls the "Second Hundred Years' War" between England and France (1688-1815) which resulted in the conquest of the major portion of the French colonies by England and the establishment of the maritime supremacy of Great Britain. The War of

¹⁹ In addition to these three classes of positive law, we have of course in the Wolfian, as in the Grotian system, the natural or necessary law which Vattel (*Preliminaries*, §§ 6-8) says "consists in the application of the law of nature to nations."

²⁰ Though not members of any particular school, the following eighteenth century publicists should receive special mention because of their influence upon the development of maritime law, more especially in connection with the law of neutrality: the Danish minister Hübner, whose important treatise entitled *De la saisie des batimens neutres* (Seizure of Neutral Vessels) was published in 1759; the French jurist Valin, whose excellent Commentary upon the *Marine Ordinance of 1681* and *Traité des prises* (Treatise on Prizes) appeared during 1760-63; Heineccius, who wrote his treatise *De navibus* in 1721 and *Elementa juris naturalis* which was translated into English in 1763; and the Italians Lampredi and Galiani who engaged in a famous controversy on the principles of the Armed Neutrality in the latter part of the eighteenth century. On these authors and this controversy, see Wheaton, *History*, espec. pp. 200, 219-229, and 309-322.

²¹ *Expansion of England*, Lect. II, pp. 24 and 29. There was, however, a long period of peace, and even of alliance, between England and France between 1713-40.

the Spanish Succession (1701-13) ended in the restoration and first formal acknowledgment of the balance of power as a fundamental principle of European policy.

During this period (1648-1713) lip-service was rendered to the leading principles and usages of the law of nature and nations laid down by Grotius and his successors, but its rules were often practically ignored. The rights and immunities of legations were generally recognized and became fully established; the doctrine of the freedom of the seas made considerable progress; and fixed rules were laid down regulating such matters as the right of visit and search, blockade, and the capture of contraband. In respect to the law of maritime capture a long backward step was taken.

The famous French Marine Ordinance of 1681²² admitted the maxim of the *Consolato del Mare* that enemy goods in a friend's vessel are good prize; but it denied the rule that the goods of a friend found on an enemy ship are free. It even declared that neutral vessels carrying enemy goods are liable to confiscation, thus limiting the lawful commerce of a neutral to his own goods carried in his own vessel.²³ With the exception of the latter rule, the principles laid down by the Marine Ordinance of Louis XIV may be said to have entered largely into the theory and international practice (both

²² This ordinance was modelled on earlier ones. The law of France varied at different times. On the Marine Ordinance of 1681 and the maritime law of this period, see especially Wheaton, *History*, 107-161.

²³ Wheaton, p. 111. "Valin states that this jurisprudence, which prevailed in the French prize courts from 1681 to 1744, was peculiar to them and to the Spanish courts of admiralty, the usage of other nations being to confiscate the goods of the enemy only." *Ibid.*, p. 114. Bynkershoek (*Questiones juris publici*, lib. I, cap. 14) denies that the neutral ship carrying enemy goods might be condemned, but he admits that the goods are subject to confiscation. He also agrees with Grotius (*De jure belli ac pacis*, lib. III, cap. 6) that the rule that "goods found in enemies' ships are to be treated as enemies' goods, ought not be accepted as a settled rule of the law of nations, but as indicating a certain presumption which may be rebutted by valid proof to the contrary." Grotius adds: "And so it was judged in full senate by our Hollanders in 1338, when war was raging with the Hansa towns; and the judgment has become law." Some eighteenth century publicists like Hübner and G. F. de Martens declared that both neutral goods and enemies' ships and enemy goods on neutral ships were free; but their views were not generally accepted either in theory or practice.

customary and conventional) of Europe during the seventeenth and eighteenth centuries.²⁴

The eighteenth century

The most important events in the international relations of the eighteenth century were: the admission of Russia under Peter the Great to full membership in the circle of European states; the rise of Prussia under Frederick the Great as a first-rate Power; the declaration and achievement of American independence; and the outbreak of the French Revolution.

The colonization of America by the leading nations of Europe, which was begun on a large and effective scale during the seventeenth and continued during the eighteenth century, gave rise to new questions to which the Roman law of *occupatio* and *alluvium*

²⁴ It is extremely difficult to say what the law was either in general or at any particular time and place. The rules of the *Consolato* seem to have prevailed quite generally during the period extending from the thirteenth to the middle of the sixteenth centuries when France adopted harsher rules. About the middle of the seventeenth century, the Dutch began to secure the insertion of the rule of "free ships, free goods" into treaties, conceding in return the confiscation of neutral goods in belligerent vessels (enemy ships, enemy goods). This latter principle was regarded as a corollary of the former, thus reversing the maxims of the *Consolato del Mare*. Even England, which became the champion of the double doctrine of the *Consolato*, yielded these rules in a number of treaties. The United States, while advocating the adoption of the principle of "free ships, free goods" and incorporating it into most of their treaties, followed English precedents in their interpretation of the customary law, thus recognizing the right of capture of enemy goods in neutral vessels. On the other hand, our government and courts have always maintained that the goods of the neutral found in the vessel of an enemy are free. The leading case is that of *The Nereide* (1815), 9 Cranch, 388, espec. p. 418.

On this subject, which has become a mere matter of historical interest since the Declaration of Paris in 1856, see De Boeck, *De la propriété ennemie sous pavillon ennemie* (1882); Bonfils-Fauchille, Nos. 1497-1526; Dupuis, *Le droit de la guerre maritime* (1899), ch. 2; Hall, Pt. IV, chs. 7 and 9; 2 Halleck (Baker's 3d ed.) 279-286; 2 Hautefeuille, *Des Droit des neutres*, Titre X; Kleen, *De la neutralité*, I, *Introduction-historique*, and II, 92-215; Lawrence, Pt. IV, ch. 4; Manning, Bk. V, ch. 6; 3 Phillimore, Pt. IX, ch. 10; 2 Ortolan, *Dip. de la mer*, liv. III, ch. 5; 2 Rivier, 429-30; Taylor, Pt. V, ch. 2; 2 Twiss, ch. 3; and 2 Westlake, 125-28.

was applied. In Europe the main issues were dynastic, economic and territorial, and the principle of the balance of power based on an equilibrium of forces was repeatedly affirmed and violated. The diplomacy of this period was dominated by Machiavelian aims and methods.²⁵ The end was the glory and aggrandizement of dynasties and states; and to attain these ends all means seemed good. Treaties were violated whenever the interests of the state (*raison d'Etat*) appeared to demand it, and wars were undertaken on the slightest pretexts. Frederick the Great suddenly invaded Silesia upon the death of Charles VI, in 1740, within a few years after having written his "Anti-Machiavelli;" and of all the states which had guaranteed the pragmatic sanction of the Emperor, England alone (and she acted from motives of self-interest) kept faith with Austria upon the accession of Maria Theresa after the death of her father. But the greatest crime committed by the Machiavelian statesmen of the eighteenth century was the extinction of one of the most important members of the European family of nations — the three-fold division of Poland in 1772, 1793, and 1795.²⁶

The Armed Neutrality of 1780

Early in 1780 the Russian Government laid down the following rules which were primarily directed against the maritime pretensions of England: 1) all neutral vessels may freely navigate from port to port;²⁷ 2) the goods belonging to the subjects of the Powers at

²⁵ On the Machiavelian character of the eighteenth century diplomacy, see espec. Sorel, *L'Europe et la Revolution Française*, I. particularly, ch. I.

²⁶ The first division of Poland has been characterized by Wheaton (*History*, p. 267) as the "most flagrant violation of natural justice and international law which has occurred since Europe first emerged from barbarism." Sorel (*op. cit.*, p. 89) remarks: "Two episodes summarized the custom of Europe on the eve of the French Revolution: the war of the Austrian Succession and the division of Poland." He calls these the "testament of old Europe," and declares that after this had been signed she could only die, leaving as a legacy the pernicious tradition of the abuses from which she perished.

²⁷ This is a denial of the famous Rule of 1756 which forbade neutrals to engage in the coasting trade of a belligerent, or in trade between a belligerent and its colonies when such trade is not permitted during peace. The rule is now prac-

war shall be free in neutral vessels, except contraband articles;²⁸ 3) such contraband articles shall be restricted to munitions of war; 4) the denomination of blockaded port shall only be given to a port "where there is, by the arrangements of the Power which attacks it with vessels, stationed sufficiently near, an evident danger in attempting to enter it."²⁹ These principles were approved by France, Spain, the United States, and Austria, and were incorporated into the conventions of the League of Armed Neutrality of 1780, which was formed by Denmark and Russia and soon joined by Sweden, Holland, Prussia, Portugal, and the king of the Two Sicilies. In 1800 these principles were affirmed anew with some modifications and additions³⁰ by the Second League of Armed Neutrality consisting of Russia, Prussia, Sweden and Denmark.

tically obsolete. Whether it was ever good law is doubtful. The principle had been applied to the coasting trade before 1756, and was extended to the colonial trade during the Seven Years' and the Revolutionary Wars. The great champion of the rule was England. The leading case is that of *The Immanuel*, 2 Rob. Rep. 186. On the *Rule of 1756*, see espec. Hall (3d ed.), § 234; 2 Kleen, § 175; Manning, Bk. V, ch. 5; 7 Moore, *Digest*, § 1180; 3 Phillimore, Pt. IX, ch. 11; and Wheaton, *History*, 217-19.

²⁸ See *supra*, note 24. This principle of "free ships, free goods" had also been asserted in 1752 by the Prussian commissioners who reported to Frederick the Great on the celebrated *Silesian Loan Controversy*. See Ch. de Martens, 2 *Causés célèbres, cause première*. For a good summary of this controversy between Great Britain and Prussia, see Wheaton, *History*, 206-17.

²⁹ Wheaton, *History*, 297-98. Upon the *Armed Neutrality of 1780*, see espec. Bergbohm, *Die Bewaffnete Neutralität* (1884); De Boeck, *De la propriété privée ennemie*, 55 ff; Fauchille, *La diplomatie française et la ligue des neutres de 1780* (1893); Manning, Bk. V, ch. 6, 325; 3 Phillimore, CLXXXVI ff; Wheaton, *History*, 295 ff.

³⁰ The main additional article adopted by the Second Armed Neutrality of 1800 affirmed that the "declaration of the officers, commanding the public ships which shall accompany the convoy of one or more merchant vessels, that the ships of his convoy have no contraband articles on board, shall be deemed sufficient to prevent any search on the convoying vessels or those under convoy." Wheaton, *History*, p. 399. It will be seen that several of the principles of the Armed Neutrality Leagues are still in advance of international law. They were, of course, far in advance of the times in which they were formulated. Though soon violated by some of the very nations which declared them, they do not deserve the cavalier treatment which they receive at the hands of several English

The French Revolution

The outbreak of the French Revolution and the successful inauguration of the American Union, based on principles of democracy, nationality and federalism, mark a new epoch in the history of international relations, as of civilisation in general.

The Abbe de Saint-Pierre had presented the world with his "Project of Perpetual Peace" in 1713. Montesquieu taught that the law of nations is naturally based upon the principle that the various nations should do each other as much good as possible in times of peace; in war as little harm as possible, without injuring their true interests. Rousseau affirmed that war is not a relation between individuals but a relation between states. Mably, the author of an important work entitled *The Public Law of Europe Based on Treaties* (1748), advocated love for justice and humanity, respect for treaties, and the immunity of private property in maritime warfare.

The National Assembly of France solemnly declared on May 22, 1790, that "the French Nation renounces wars of conquest and will never use force against the liberty of any people."³¹ But on November 19, 1792, the National Convention, abandoning the early principles of the Revolution, issued its famous decree that France "will grant fraternity and aid to all peoples who may wish to recover their liberty,"³² — a decree which was, however, abrogated on April 14, 1793, by one declaring in favor of non-intervention. The Jacobins incorporated the principle of non-intervention in their still-born con-

publicists. As Lawrence (*Principles*, 3d ed., p. 104) points out, "the controversies attending the formation, progress, and dissolution of the two great Leagues known as the Armed Neutralities of 1780 and 1800 did almost as much to clear up the question of neutral rights as the Alabama Controversy and the action of Washington in his second administration did to clear up the question of neutral duties."

³¹ 2 Sorel, *L'Europe et la Rev. Française*, p. 89. This decree became part of Tit. VI of the Constitution of 1791. See Anderson, *Constitutions and Documents*, 93; and Helie, *Les Constitutions*, 293.

³² 3 Sorel, *op. cit.*, 170. This decree was supplemented by that of December 15, 1792, proclaiming liberty and sovereignty to all peoples. See Anderson, *op. cit.*, No. 28, pp. 130-32.

stitution of 1793.³³ On June 18, 1793, Abbe Gregoire presented a "Project for a Declaration of the Law of Nations" in twenty-one articles,³⁴ as a pendant to the "Declaration of the Rights of Man" of 1789. It contained few principles which are unsound. Some of them form part and parcel of the fundamental rights of states; others belong to the international law of the future; only a few are impracticable. This project, which has been characterized as Utopian, was rejected by the convention; but it may nevertheless be regarded as expressing the altruistic and idealistic spirit of the French Revolution in its attitude toward foreign nations. As in the case of the "Declaration of the Rights of Man," its great defect was that it contained no declaration of *Duties*.

The revolutionary and Napoleonic era

Like historical Christianity, the French Revolution proved false to its principles, and France entered upon a career of aggression and conquest which culminated in the short-lived Napoleonic empire (1804-14), embracing the greater part of central and southern Europe. As in the case of the aggressions of Louis XIV, Great

³³ "The French people declares itself the friend and natural ally of free peoples; it does not interfere in the governments of other nations; it does not allow other nations to interfere in its own." Arts. 118-119 of the Const. of 1793. Anderson, No. 39, p. 183.

³⁴ The more important of these articles are as follows:

Art. 2. The peoples are independent and sovereign. . . .

Art. 3. A people should do to others as it would have them do to it. . . .

Art. 4. The peoples should do each other as much good as possible in times of peace; in war, the least harm possible.

Art. 5. The particular interest of a people is subordinate to the general interest of the human family.

Art. 6. Every people has a right to organize and change its government.

Art. 7. A people has not the right to intervene in the government of others.

Art. 10. Each people is master of its territory.

Art. 15. An enterprise against the liberty of one people is a criminal attempt against all the others.

Art. 21. Treaties between the peoples are sacred and inviolable.

For the full text of this remarkable declaration, see Nys, *La Revolution française et le droit int.* in *Etudes*, II, 395-6; and I Rivier, pp. 40-41.

Britain headed a series of coalitions against Napoleon I which ended in his downfall and the reduction of France to her former boundaries. During the period of the gigantic revolutionary and Napoleonic struggles (1792-1815), fundamental principles and customs of international law, more especially of maritime law, were set at naught by both France and England, and the rights of neutral commerce were violated in the most outrageous manner. Napoleon, through his Berlin and Milan decrees of 1806 and 1807, not only declared the whole British Isles to be in a state of blockade and interdicted all commerce and correspondence with them, but ordered that all vessels sailing to or from any port in the United Kingdom or its colonies should be confiscated.³⁵

The British Orders in Council declared all French ports, together with those of her allies, to be in a state of blockade, and ordered the confiscation of any neutral vessel carrying "certificates of origin" — a device for distinguishing between British and neutral goods. These measures taken together threatened the destruction of all neutral commerce. These abuses called forth the protest and opposition of the United States, which became the main champion of neutral rights and duties at the beginning of Washington's administration in 1793 — a position which she has since, on the whole, maintained.³⁶

³⁵ The "Continental System" of Napoleon was only a continuation of a policy begun under the First French Republic. "Already in 1793 England and Russia interdicted all navigation with the ports of France, with the intention to subdue her by famine. The French Convention answered with an order to the French fleet to capture all neutral ships carrying provisions to the ports of the enemy or carrying enemy goods." 1 Oppenheim, § 46. For details, see Mahan, *Influence of Sea Power upon the French Revolution and Empire*, II, ch. 17; and Wheaton, *History*, 372 ff.

On Napoleon's *Continental System*, see Manning, *Law of Nations*, Bk. V, ch. 10; and the vast Napoleonic literature, especially Fournier, Rose, Sloane, Lanfrey, etc. Perhaps the best accounts are those by Mahan, *op. cit.*, ch. 18; and Henry Adams, *History of the U. S.*, *passim*, particularly Vol. IV, ch. 4.

For the documents bearing upon the System, see Anderson, *Constitutions and Documents*, No. 77, and the University of Pa. *Trans. and Reprints*, Vol. II, No. 2, 17-26.

³⁶ For good accounts of the efforts of the United States to maintain and enforce neutrality during the Revolutionary and Napoleonic period, see Wheaton, *Int. Law* (Dana's ed.), note 215; Moore, *Am. Diplomacy*, chs. 2 and 3; Henry Adams, *History of the U. S.*, *passim*.

Though a period of conquest, violence and reaction, it must not be forgotten that the French under Napoleon virtually destroyed old feudalistic and absolute Europe, and sowed the seeds of democracy and nationality which eventually bore fruit³⁷ in a new and in part rejuvenated and regenerated Europe.

The Congress of Vienna

The balance of power in Europe was once more restored at the reactionary Congress of Vienna in 1814-15.³⁸ Though largely basing its work upon the principles of legitimacy³⁹ and ignoring the powerful forces of democracy and nationality, this congress nevertheless established a new political order in Europe and settled some important questions of international law. It defined the relative rank of ministers, envoys and ambassadors; declared in favor of the abolition of the African slave trade; and agreed upon general principles intended to secure freedom of navigation on great international rivers, at least by co-riparian states.

Among the political acts of the Congress of Vienna should be particularly noted: the union of Norway and Sweden and of Belgium and Holland; the reorganization and neutralization of Switzerland; the reorganization of the new Germany of 39 States into a loose confederacy; and, in general, the restoration of the old dynasties in France, Spain, Italy and Germany.⁴⁰

³⁷ Especially fruitful were the Secularization and Mediation Acts which reduced the number of German States to thirty-nine, and prepared the way for Bismarck's work of unification and reorganization in Germany.

³⁸ On the *Congress of Vienna*, see especially Debidour, *Histoire diplomatique de l'Europe*, ch. 11, 2 Fyffe, *History of Modern Europe*, ch. 1; Rose, *Revolutionary and Napoleonic Era*, ch. 11; Seignobos, *Histoire politique de l'Europe contemporaine* (Eng. trans. 1899), ch. 1; Stephens, *Revolutionary Europe*, ch. 11; Wheaton, *History*, 424-506. See also Hazen, *Europe since 1815*, ch. 1 and pp. 738-39, for select bibliography.

³⁹ But this principle was not thoroughly and consistently applied, e. g., in Sweden and Germany.

⁴⁰ The main lines of this restoration of Europe were laid down by the allies in the treaty of Chaumont of March 1, 1814.

The period of reaction (1815-48)

Under the deadening influence of the Metternich system,⁴¹ the reaction continued for a generation (1815-48) after the close of the Congress of Vienna. Yet there was progress even during this oppressive regime.

The Holy Alliance.

In 1815 the Emperors of Russia and Austria and the King of Prussia formed what is generally known as the Holy Alliance,⁴² pledging themselves to apply the precepts of Christianity, *viz.*, fraternity, justice, charity and peace, to the conduct of international as well as internal affairs. But much more important than this paper alliance based on mere sentiment and vague aspirations possibly cloaking ulterior designs, was the renewal of the Quadruple Alliance the same year between Russia, Austria, Prussia, and England. In Article 6 it was decided "to hold periodical meetings consecrated to great common objects, and to concert measures for the repose and prosperity of the peoples."⁴³

The Concert of Europe

This alliance marks the beginning of the European Concert which undertook to suppress revolutions, maintain the treaties of Paris and Vienna, and regulate the affairs of Europe generally. It marks an attempt to substitute for the old European states-system or community of nations a new society or confederacy which should be under the control or dictatorship of a committee of the Great Powers. In 1818 it was joined by France and became known as the Pentarchy, but a rift in the alliance soon showed itself when England and France refused to sign the Troppau Protocol of 1820.⁴⁴ England

⁴¹ On "Europe under the Metternich System," see espec. Seignobos, *Pol. History of Europe*, ch. 25; and Hazen (see index and bibliographies).

⁴² For the text of the *Holy Alliance*, see the University of Pa. *Trans. and Reprints*, Vol. I, No. 3, p. 940. For a good summary, see Hazen, 14-16.

⁴³ Phillips, *Modern Europe*, p. 19; or Hazen, 16 ff.

⁴⁴ The Protocol of Troppau was an extension to Europe of the reactionary

withdrew altogether at Verona in 1822. At Aix-la-Chapelle (1818) the Powers declared for the first time that it was their "unalterable determination never to swerve from the strictest observance of the principles of the law of nations, either in their relations with one another or with other states."⁴⁵ In pursuance of their policy of intervention — a principle to which England never assented — they held a series of congresses (1818-22)⁴⁶ which authorized interventions in Naples, Piedmont, and Spain.

The Monroe Doctrine

When, however, it was proposed to extend this system to the Spanish colonies in America which had achieved their independence, the President of the United States, acting upon a hint from the great British statesman Canning, interposed and promulgated the famous Monroe Doctrine in his annual message to Congress of December 2, 1823. He declared that "we should consider any attempt on their part (*i. e.*, of the Allied Powers) to extend their system to any portion of this hemisphere as dangerous to our peace and safety." He added:

With the existing colonies or dependencies of any European Power we have not interfered and shall not interfere. But with the Governments who have declared their independence and maintained it, and whose independence we have, on great consideration and just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by

Carlsbad Decrees which had struck such a severe blow at freedom in Germany. It declared that the "States which had undergone a change of government due to revolution, the results of which threaten other States, *ipso facto*, cease to be members of the European Alliance, and remain excluded from it until their situation gives guaranties for legal order and stability."

For the text of the *Carlsbad Decrees* and *Troppau Protocol*, see Univ. of Pa. *Trans. and Reprints*, Vol. 1, No. 3, pp. 16-24. For good accounts, see Phillips, pp. 73 and 96; and Hazen, 59-60.

⁴⁵ For the text of this declaration, see Nys on *Le Concert Européen* in 2 *Etudes*, p. 27.

⁴⁶ It is to the work of these congresses and the system represented by them that the term "Holy Alliance" has been usually applied.

any European Power in any other light than as the manifestation of an unfriendly disposition toward the United States.⁴⁷

The promulgation of the Monroe Doctrine, which was followed by the recognition of the independence of the Latin American states by England, definitely added to the society of nations the leading states of South America and Mexico.⁴⁸

The system and principles of the so-called "Holy Alliance" were finally overthrown by the revolutions of 1830 and 1848 which, though followed by a period of reaction, eventually substituted the principles of nationality, democracy and constitutional rule for those of legitimacy and absolutism.

The Declaration of Paris of 1856

The next important step in the development of international law was taken at the close of the Crimean War in 1856. Not only was

⁴⁷ 2 Richardson, *Messages and Papers of the Presidents*, 218.

In another part of this same message (p. 209), Monroe also declared that "the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European Powers." This part of the message was directed primarily against the encroachments of Russia in the Northwest.

Perhaps the best and most inclusive statement of the American policy is contained in a letter by Jefferson to Monroe, dated October 24, 1823: "Our first maxim should be, never to entangle ourselves in the broils of Europe. Our second, never to suffer Europe to intermeddle in cis-Atlantic affairs."

On the Monroe Doctrine, see especially Dana's note 36 to Wheaton's *Int. Law*; Barral de Montferrat, *De Monroe à Roosevelt* (1905); Beaumarchais, *La Doctrine de Monroe* (1898); Edginton, *The Monroe Doctrine* (1904); Ford in 7 *Am. Histor. Rev.*, 676-96; Henderson in *American Diplomatic Questions* (1901), Pt. IV; Moore in *American Diplomacy*, ch. 6; 6 *Moore's Digest*, ch. 20; Petin, *Les Etats Unis et la Doctrine de Monroe* (1900); Reddaway, *The Monroe Doctrine* (1898); Snow, *Am. Diplomacy*, Pt. II; Turner, *Rise of the New West*, in 14 *Am. Nation Series*, ch. 12. A good appreciation of the Monroe Doctrine is also contained in Moulin's excellent work on *La Doctrine de Drago* (1909). For a good select bibliography, see Hart, *Manuel*, pp. 61-62 and 246-48.

⁴⁸ Their recognition by the United States took place in the spring of 1822: by England early in 1825. See Paxson, *The Independence of the South American Republics* (1903).

Turkey expressly admitted to theoretical full standing as a member of the society of nations, but the Congress of Paris issued the following epoch-making declaration of leading principles of maritime international law:⁴⁹

- 1) Privateering is and remains abolished.
- 2) The neutral flag covers enemy's goods, with the exception of contraband of war.
- 3) Neutral goods, with the exception of contraband of war, are not liable to capture under an enemy's flag.
- 4) Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of an enemy.

The period since 1856

The half century beginning with the Declaration of Paris in 1856 and ending with the London Conference in 1909 has seen greater progress in the direction of internationalism and more successful attempts to improve and codify international law than any other in history, or perhaps more than all previous half-centuries combined. It has been a period of congresses and conferences,⁵⁰ of international unions and associations with definite organs in the shape of com-

⁴⁹ The Declaration of Paris was signed on April 16, 1856, by all the Powers represented at the Congress, viz., England, France, Austria, Russia, Sardinia, Turkey, and Prussia. The states not represented at the Congress were invited to sign, and most of them did so before the end of the year. Japan signed in 1886. The United States, Spain, Mexico and a few minor states held out, but all have in practice observed the rules of the Declaration. Spain gave notice of her adhesion at the Hague Conference of 1907. The objection of the United States was based upon the idea that inasmuch as we did not possess a large navy, the right to fit out privateers must be retained until the capture of private enemy property at sea is abolished. Inasmuch as this condition no longer holds and all the maritime Powers have observed the rules laid down by the Declaration of Paris for at least fifty years, there is no longer any reason for denying or doubting their validity as international law.

On the *Declaration of Paris*, see especially Dana's note to Wheaton; and Higgins, *The Hague Peace Conferences* (1909), 1-4.

⁵⁰ All real distinction between the words Congress and Conferences, if such ever existed, seems to have been lost.

missions and bureaus which are rapidly developing a sort of international legislation and an international administrative law.

Although the principle of nationality won its greatest triumphs during this period in the achievement of Italian and German unity (1859-70), it seems that the spirit of nationality is being modified or supplemented by that of internationalism, and that the older conceptions of sovereignty and independence are yielding to ideals of interdependence.

Codification of the law of nations

The first important step towards the codification of the laws of land warfare was taken in 1863 when our government published the "*Instructions for the Government of Armies of the United States in the Field*" prepared by Dr. Francis Lieber.⁵¹ In 1864 there was concluded, on the initiative of Switzerland, the Geneva Convention for the Amelioration of the Condition of the Wounded in War.⁵² This convention, which provided for neutralization of persons and things connected with the care of the sick and wounded, was signed by nearly all civilized Powers. By the Declaration of St. Petersburg of 1868 many states renounced, in case of war between themselves, the use of any "projectile of less weight than 400 grammes (about 14 ounces) which is explosive, or is charged with fulminating or inflammable substances."⁵³

⁵¹ The *Instructions* are printed as an Appendix in Scott's *Texts of the Hague Conferences*, and as an Appendix in Wilson's *International Law*.

⁵² For the text of the Geneva Convention (including the Additional Articles of 1868), see Higgins, *The Hague Peace Conferences*, 8-17; Whittuck, *Int. Doc.*, 3-9; or I SUPPLEMENT to this JOURNAL (1907), 90-95. But the Additional Articles failed of ratification. The convention resulted from an agitation aroused by the indefatigable labors of M. Moynier and the publication of a book entitled *Un Souvenir de Solferino* by M. Dunant, a Swiss philanthropist, who had witnessed the terrible sufferings of the wounded in that battle (1859).

⁵³ This was based on the principle that the only legitimate object of war "is to weaken the military force of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men; that this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable." See preamble of the *Declaration* in Higgins, 6; Whittuck, 10.

The London Conference of 1871

In 1871 the Conference of London⁵⁴ solemnly proclaimed "that it is an essential principle of the law of nations that no Power can liberate itself from the engagements of a treaty, or modify the stipulations thereof, unless with the consent of the contracting Powers by means of an amicable agreement." But it is very doubtful whether, stated in this absolute form, the above declaration is a principle of international law.

The Brussels Conference of 1874

In 1874 the Brussels Conference⁵⁵ presented the world with a code of warfare which, although it failed of ratification, obtained great authority and was generally observed. It was largely based on the American "Instructions" and became in its turn the model for the Hague code of 1899.

The West African Conference

The next important conference was that of the West African Conference which met in 1884-5 to decide certain questions concerning the Congo Free State, whose independence it recognized. This conference, at which the United States was represented, stipulated for freedom of trade and travel within the Congo basin; agreed to "strive for the suppression of slavery, and especially of the negro slave

⁵⁴ This conference was attended by representatives of the same Powers which had signed the Treaty of Paris of 1856 — an agreement which Russia had violated by reestablishing her maritime arsenal on the Black Sea upon the outbreak of the Franco-German War of 1870.

⁵⁵ For the text of the *Code of the Brussels Conference*, see Higgins, 273-80; Wilson and Tucker, *Int. Law*, 384-94 (Appendix III); SUPPLEMENT to this JOURNAL (1907), 96-103; or Scott, *Texts of the Two Hague Conferences*.

The Brussels Conference was attended by delegates from fifteen European states. Owing to a misunderstanding, the United States was not represented. The Latin American states were not invited, and several delegates from South American states were refused admission. See Nys in 2 *Etudes*, 39-40. On the *Brussels Conference*, see espec. Holland, *Studies*, 59-78; and F. de Martens, *La Paix et la Guerre* (1901), 73-132.

trade;⁵⁶ engaged to respect the neutrality of the Congo territories; and the signatory Powers obligated themselves to preserve reasonable order in the territories occupied by them, as also to notify one another of any future occupations or the establishment of future protectorates on the coast of the African continent.

International unions and congresses

The period since 1850 has also been characterized by a remarkable number and variety of international unions and conferences,⁵⁷ both public and private, dealing with economic, social, and sanitary matters. Beginning with the first International Sanitary Conference held at Paris in 1851,⁵⁸ we have a long succession of official international congresses dealing with all sorts of subjects, such as statistics, sugar duties, weights and measures, monetary matters, international postal and telegraphic correspondence, navigation of rivers, the metric system, submarine cables, private international law,

⁵⁶ Art. 6 of the "General Act of the Conference of Berlin Concerning the Congo," which is printed in the SUPPLEMENT to this JOURNAL (1909), No. 1, pp. 7-25. This Act was signed by the leading maritime Powers, the United States, and a number of the minor European states (including Turkey) — fourteen in all.

It was afterwards supplemented by the Conference of Brussels of 1890, attended by seventeen states (including the additional states of Persia, Zanzibar and the Congo), which agreed upon a "General Act for the Repression of the African Slave Trade and the Restriction of the Importation into, and Sale in, a certain defined Zone of the African Continent of Firearms, Ammunition and Spiritous Liquors." For the text of this Act of 100 Articles, see SUPPLEMENT, *op. cit.*, 29-59.

On the "Origin of the Congo Free State," see an interesting article by Jesse S. Reeves in this JOURNAL (1909), 99-118.

⁵⁷ For a list of 116 such congresses or conferences of an official character since 1850, compiled by the Hon. S. E. Baldwin, see this JOURNAL (1907), 808-817. It is followed by a list (pp. 818-29) of nearly 200 international congresses, conferences or associations, composed of private individuals. These lists must be far from complete, for there are said to have been over 160 international congresses during the year 1907 alone.

⁵⁸ At this conference twelve Powers were represented. There have been many subsequent International Sanitary Conferences. "In the one field of sanitation and medicine there are at least twenty separate international organizations." Professor Reinsch in New York *Independent* for May 13, 1909.

protection of industrial property, railroad transportation, commercial law, international copyright, regulation or suppression of the liquor traffic in certain places, customs duties, promotion of the interests of the working classes, abolition of the slave trade, protection of labor in mines and factories, international arbitration, fisheries, repression of epidemic diseases, international telephony, suppression of the "white slave" traffic, international wireless telegraphy, agriculture, etc.⁵⁹

The most important of these are perhaps the Conference on Telegraphic Correspondence which met at Paris in 1865 and formed the Universal Telegraph Union; the Universal Postal Union founded in 1874; the European Union of Railway Freight Transportation (1890); the Union for the Protection of Industrial Property, *i. e.*, patents, trademarks, etc., created in 1883; the Hague Union of 1886 for the Protection of Works of Art and Literature; the four Hague Conferences (between 1893 and 1904) on Private International Law; and the four Pan-American Congresses which have been held since 1890.

Many of these unions⁶⁰ are endowed with permanent organs of legislation and administration. Their legislative organ may be said

⁵⁹ In addition to the lists referred to above, see the articles on "International Conferences" and "International Unions" by Governor Baldwin and Professor Reinsch in this JOURNAL (1907), pp. 569-623. For general references, see pp. 582 and 602 and Bonfils-Fauchille, note, pp. 496-7. The main authorities are Decamps, *Les Offices internationaux* (1894); Moynier, *Les bureaux internationaux* (1892); Van Overbergh, *L'association int.* (1907); Poincard, *Droit int. conventionnel* (1894); *ibid.*, *Les Unions et ententes internationales* (2d ed. 1901); *ibid.*, *Le droit int. au XVe siècle* (1907); Meili, *Die internationalen Unionen* (1885-89) in several volumes; and Reinsch, *Public International Unions, their work and organization* (1911).

Very few writers on international law devote much space to this subject. Exceptions are Bonfils-Fauchille, Nos. 914-928; 2 Mérignhac, *Traité*, 688-732; Liszt, §§ 16-17, 28-30, 33-36; 2 Nys, *Le Droit Int.*, sec. VIII, ch. 8; 1 Oppenheim, §§ 458-71, 578-91; Ullmann, § 58. The Russian F. de Martens, *Traité*, devotes two whole volumes (II and III) to what he calls "*International Administration*;" but his whole system is erroneous. He classifies the right of embassy, private international law and war and neutrality under this head.

⁶⁰ There are said to be over thirty public or official international unions.

to be the conference or congress where unanimity is the general rule, but to which there are exceptions. The administrative organs are commissions and bureaus.⁶¹ One result of the activities of these various organs will doubtless be the development of the science of international administrative law — a branch of international jurisprudence which is still in its infancy.

International arbitration

The practice of international arbitration, which had greatly declined at the close of the Middle Ages and which had almost disappeared from international usage during the seventeenth and eighteenth centuries,⁶² may be said to have been revived by the Jay treaty of 1794 between England and the United States, which provided for the reference of several questions to arbitration. But it was not until the smoke had cleared away from the battlefields of the revolutionary and Napoleonic wars that the practice of arbitration spread or became more or less general. This movement, which had become a subject of international agitation, begun in the United States and England, was given a great impetus⁶³ through the successful arbitration of the Alabama claims by the Geneva Arbitration of 1872. Since then arbitrations and arbitration treaties seem to have

⁶¹ The commissions are generally composed of representatives of the members of the unions and sometimes exercise a sort of control or supervision over the bureaus, many of which are located at Berne, Switzerland.

On this subject, see especially the excellent article entitled *Administrative Law and National Sovereignty* by Professor Reinsch in this JOURNAL (1909) 1-45.

⁶² This fact was doubtless largely due to the absolute monarchs of this period who, ruling by divine right, were unwilling to submit their cause to any other than the God of hosts.

⁶³ In 1828 the American Peace Society was founded by William Ladd of Massachusetts. In 1840 he published his prize essays on *A Congress of Nations*, which contained a notable project of a "Court of Nations" as well. For a good description of his work, see an address by J. B. Scott in 70 *Advocate of Peace*, 196-200.

The first American peace association appears to have been founded by David L. Dodge in New York in 1815. The London Peace Society was founded in 1816.

increased in a sort of arithmetical progression,⁶⁴ and they have been particularly numerous since a new epoch in the history of internationalism was ushered in by the work of the Hague Peace Conferences of 1899 and 1907.

Limitation of armaments

In the latter part of the nineteenth century a kindred movement in favor of a limitation of armaments was making considerable headway. Ever since the Franco-German War of 1870, as a result of a Machiavelian statecraft combined with that policy of "blood and iron" which Bismarck has left as a heritage to modern Germany, and as a consequence of the new colonial and commercialism⁶⁵ which

⁶⁴ For a very complete account of the arbitrations to which the United States had been a party up to 1898, see Moore's monumental *History and Digest of Tribunals*, in five volumes. Darby (*Int. Tribunals*, 4th ed., 1904, pp. 769 ff) gives a list of 228 instances of "formal" arbitration between 1794 and 1901. Of these there were 91 cases prior to 1872 and 137 between 1872 and 1901. The United States was a party in 62 cases; Great Britain, 81; France, 28; Prussia or Germany, 17; Russia, 8. Many of these arbitrations were with or between Latin American states, where this movement has made great progress. (On "Arbitration in Latin America," see a book by Quesada published in 1907.) La Fontaine (*Histoire Sommaire*) gives a list of 177 instances between 1794 and 1900. Darby also gives a list of 249 instances of arbitration less formal in character (*i. e.*, by boards of commissions) during the same period. He cites 21 instances of formal arbitration and 39 of the less formal sort, during the first four years (1901-1904) of the twentieth century.

Prior to 1899 the number of arbitration treaties were, comparatively speaking, few in number, but they have greatly increased, especially since 1899. There were 64 such treaties between 1899 and 1907 and the number of arbitration treaties since the meeting of the first Hague Conference had mounted up to about 130 in 1908.

For a list of 67 arbitration treaties between 1900 and 1908, see this JOURNAL (1908), pp. 824-26. The United States has been a party to over 20 such treaties. Fried (*Die Moderne Friedensbewegung*, pp. 26-27) gives a list of arbitration treaties between 1899-1907. For bibliographies on arbitration, see Griffen, *List of References*, published by the Library of Congress (1908); La Fontaine (1904); and Olivart, *Bibliographie*, etc.

⁶⁵ The founder or apostle of this new imperialism appears to have been Lord Beaconsfield. It was not fully adopted by Germany until about 1890. See especially the chapters on "National Imperialism" and "German Imperial Politics" in Reinsch, *World Politics* (1900). For references, see his "Bibliographical Notes."

has taken possession of leading nations (notably of Great Britain and Germany), Europe has been virtually transformed into an "armed camp." This policy has, indeed, preserved peace on the European Continent for a generation, but at a fearful economic, social, and moral cost to humanity.

The First Hague Peace Conference

With a view of "seeking, by means of international discussion, the most effectual means of insuring to all peoples the benefits of a real and durable peace, and above all, of putting an end to the progressive development of the present armaments," Czar Nicholas II of Russia⁶⁶ convened the First International Peace Conference which met at The Hague on May 18, 1899.⁶⁷

The First Hague Peace Conference soon realized that even a limitation of the increase of military and naval expenditures was impracticable at that time, and devoted its chief energies to the secondary purpose for which it had been called, *viz.*, to devise means of securing "the maintenance of general peace."

Owing mainly to the opposition of Germany, the Russian plan of inclusive and limited compulsory arbitration was rejected; but the British and American plan of a so-called "Permanent Court of Arbitration"⁶⁸ was adopted in spite of the objections of the German Government, and arbitration was recommended "in questions of a judicial character, and especially regarding the interpretation of treaties."⁶⁹ A code of arbitral proceeding was also adopted and recommended.⁷⁰

⁶⁶ Russian *Rescript* of August 24, 1898.

⁶⁷ Twenty-six states were represented. Of these, twenty were European; five (China, Japan, Persia, Korea and Siam) were Asiatic; and only two (the United States and Mexico) American.

⁶⁸ The so-called Hague Tribunal is not even a court; it is a panel or list from which judges may be chosen.

⁶⁹ Art. 16 of the arbitration treaty or first convention.

⁷⁰ The great advantage of such a code is that it facilitates arbitration. It is no longer necessary for governments to enter into long and tedious negotiations respecting the mode of procedure on the occasion of each controversy.

In addition to the Convention for the Pacific Settlement of International Disputes, the Hague Conference of 1899 also agreed to two other conventions, three declarations, and expressed several wishes. Very important was the Convention Regulating the Laws and Customs of Land Warfare based on the work of the Brussels Conference of 1874. The conference also adapted the principles of the Geneva Convention of 1864 to maritime warfare. It "declared" against the launching of projectiles and explosives from balloons for five years; the use of projectiles the only object of which is the diffusion of asphyxiating or deleterious gases; and the use of "dum dum" bullets. The conference also expressed a series of six wishes in favor of consideration, at a subsequent conference, of questions relating to the rights and duties of neutrals; the inviolability of private (enemy) property in naval warfare; and the bombardment of ports, towns, and villages by a naval force. It even expressed a wish that the governments might "examine the possibility of an agreement as to the limitation of armed forces by land and sea, and of war budgets."

The Second Hague Peace Conference

Acting upon the request of the Interparliamentary Union which met at the St. Louis Exposition in 1904, President Roosevelt suggested the meeting of a Second International Peace Conference on September 21st of that year. In accordance with the terms of the resolution adopted at St. Louis, he recommended the following questions as proper subjects for consideration:

- 1) The questions for the consideration of which the Conference at the Hague expressed a wish that a future Conference be called.
- 2) The negotiation of arbitration treaties between the nations represented at the Conference to be convened.
- 3) The advisability of establishing an International Congress to convene periodically for the discussion of international questions.

Owing, however, to the continuance of the Russo-Japanese War until September 5, 1905, the outbreak of the Russian revolution which followed, and to the further delay caused by the meeting of the

Third Pan-American Conference, the Second International Peace Conference did not meet at The Hague until June 15, 1907.⁷¹

President Roosevelt generously conceded the honor of convening the Second Hague Conference to Czar Nicholas II who, for obvious reasons, omitted "limitation of armaments" from the Russian program. But Great Britain insisted upon raising this question, and the United States was determined to ask for a consideration of the Drago Doctrine in a modified form, *i. e.*, the question of prohibiting the use of armed force for the recovery of contract debts unless arbitration is refused, or in case of failure to submit to an arbitral award.⁷²

Owing mainly to the opposition of Germany, Austria, Japan, and Russia, the British Government failed in its attempt to secure a consideration of the question of a limitation of armaments or restriction of military expenditures. Germany even opposed the insertion of the words "more urgent than ever" in the resolution which was adopted confirming the resolution of 1899 relative to this matter.⁷³

Though the Second Hague Peace Conference of 1907 failed in some respects to meet the expectations even of conservative international jurists, it must be admitted that it was, on the whole, a notable success. It has to its credit thirteen conventions or treaties, one declaration, three wishes, and several recommendations.

⁷¹ Out of the 57 states claiming sovereignty, 44 Governments were represented at this conference. These included 18 Latin American states. The other two — Honduras and Costa Rica — were invited, and appointed delegates, but these did not take their seats. Asia was again represented by Japan, China, Persia and Siam. Korea, having been occupied by Japan, was refused admission. As in 1899, the vote of Montenegro was cast by Russia's representatives and Bulgaria was again permitted by Turkey to send delegates.

The number of delegates had increased from 100 in 1899 to 256 in 1907.

⁷² On the Drago Doctrine, see especially Moulin, *La Doctrine de Drago* (1908); Drago in this JOURNAL (1907), pp. 692-726; and Hershey, *The Calvo and Drago Doctrines*, *ibid.*, 26-45. For the "Instructions" of December 20, 1902, by Señor Drago, the famous Argentine Minister and author of the Doctrine, see I SUPPLEMENT to JOURNAL, 1-6.

⁷³ The Conference of 1899 had declared itself of the "opinion that the restriction of military charges, which are at present a heavy burden on the world, is extremely desirable for the increase of the material and moral welfare of mankind;" and it had expressed a wish that the governments examine the question.

The Final Act of the conference included the following conventions or treaties:

- I) "Convention (of 97 articles) for the pacific settlement of international disputes" — a revision of the convention of 1899 dealing with this subject.
- II) "Convention (of 7 articles) respecting the employment of force, for the recovery of contract debts" — the famous Porter resolution embodying a modification of the Drago Doctrine.
- III) "Convention (of 8 articles) relative to the opening of hostilities."
- IV) "Convention (of 56 articles) regarding the laws and customs of land warfare" — a revision of the Hague code of 1899.
- V) "Convention (of 25 articles) regarding the rights and duties of neutral powers and persons in case of war on land."
- VI) "Convention (of 11 articles) relative to the status of enemy merchant ships at the outbreak of hostilities."
- VII) "Convention (of 12 articles) relative to the conversion of merchant ships into war ships."
- VIII) "Convention (of 13 articles) relative to the laying of submarine mines."
- IX) "Convention (of 13 articles) respecting bombardments by naval forces in time of war" — an application of the rules governing bombardment on land to naval warfare.
- X) "Convention (of 28 articles) for the adaptation of the principles of the Geneva convention (of 1906) to maritime warfare" — a revision of the Hague convention of 1899 which had adapted the Geneva convention of 1864 to maritime warfare.
- XI) "Convention (of 14 articles) relative to certain restrictions on the exercise of the right of capture in maritime warfare." This convention includes provisions relating to the inviolability of postal correspondence, the exemption from capture of vessels engaged in coast fishing, etc., and

regulations regarding the disposition of the crews of enemy merchant ships captured by a belligerent.

XII) "Convention (of 57 articles with an Annex) relative to the establishment of an International Prize Court."

XIII) "Convention (of 33 articles) respecting the rights and duties of neutral powers in naval war."⁷⁴

The conference renewed "for a period extending to the Third Peace Conference" the declaration of 1899 prohibiting "the discharge of projectiles and explosives from balloons or by other new methods of a similar nature." It also declared itself "in principle" in favor of obligatory arbitration,⁷⁵ and that certain "differences, and notably those relating to the interpretation and application of international conventional stipulations, are susceptible of being submitted to obligatory arbitration without any reservation."

A resolution, confirming that of 1899 in favor of the desirability of the limitation of military burdens was adopted; and "in view of the fact that military burdens have considerably increased in nearly

⁷⁴ For a table showing which states had signed the various conventions of the Second Hague Conference by June 20, 1908 — the final date set for signatures of the plenipotentiaries — see this JOURNAL (1908), 876-77; Higgins, 530-31; or 2 Scott, *The Hague Peace Conferences*, 528-31. All but one (Paraguay) had signed the Final Act. The greatest delinquents were China (which had only signed the declaration, the first convention, and the Final Act) and Nicaragua (which had only affixed her signatures to the Final Act). Nicaragua has since given her adhesion to nearly all the Hague conventions. The only conventions which fared badly were the Porter resolution which was only signed (and even then with many reservations) by thirty-four states; the convention on submarine mines which failed to receive the signatures of seven states (including Russia); the convention relative to the establishment of an International Prize Court, which was only signed by thirty-one states (Great Britain, Japan, Russia and Brazil being among the non-signatories); and the declaration prohibiting projectiles from balloons, which failed of seventeen signatures. The United States did not sign Conventions VI, VII, and XIII.

For a table showing ratifications, see this JOURNAL (1911), 769-70.

⁷⁵ The failure of the conference to agree upon a definite plan of obligatory arbitration was mainly due to the opposition of Germany and Austria. The proposition of the United States in favor of exclusive limited compulsory arbitration had thirty-five votes in its favor and only nine against it, with three abstentions. See Professor Hull's excellent article on "Obligatory Arbitration and the Hague Conferences" in this JOURNAL (1908), 731-42; and 1 Scott, ch. 7.

all countries since the said year,"⁷⁶ the conference declared it "highly desirable for governments to undertake again the serious examination of this question."

The Hague Conference of 1907 made the following notable recommendations and wishes: 1) A recommendation that the signatory Powers adopt and enforce a project or draft of a "Convention (of thirty-five articles) for the organization of a Court of Arbitral Justice"⁷⁷ as soon as they shall have reached an agreement upon the selection of judges and the constitution of the court. 2) A wish that "in case of war the proper civil and military authorities make it their very special duty to insure and protect the maintenance of peaceful intercourse, and notably the commercial and industrial relations, between the peoples of the belligerent states and of neutral states." 3) The wish that "the Powers settle, through special conventions, the situation in respect to the support of the burden of military occupations by foreigners resident within their territories." 4) The wish that "the elaboration of regulations relative to the laws and customs of maritime warfare may figure in the program of the next conference, and that in any case, the Powers apply, as far as possible, to maritime warfare the principles of the Convention

⁷⁶ They have gone on increasing since 1907. It would be "highly desirable" to recommend action, or at least negotiation, on this subject at the next conference.

⁷⁷ This draft, which was mainly based on a project presented by the United States, was annexed to the first recommendation of the conference and is contained in the Final Act. It failed of adoption because of the opposition of many of the smaller states led by M. Ruy Barbosa of Brazil. It provides for a permanent court of competent judges (number not specified) "representing the various juridical systems of the world" appointed for a term of twelve years and capable of reappointment. These judges shall meet at The Hague once a year if necessary (in June), to decide pending cases and designate three judges to whom it delegates its powers. The Powers were unable to agree upon the constitution of the court and the apportionment of the judges.

For the text of this very interesting project, see 2 SUPPLEMENT to this JOURNAL (1908), 29-43; Higgins, *The Hague Peace Conferences*, 498-509; and Scott, *The Texts of the Two Hague Conferences*. See especially the admirable article on "The Proposed Court of Arbitral Justice" by J. B. Scott, the real author of the project, in this JOURNAL (1908), 772-810; and ch. 9 of 1 Scott's *Hague Peace Conferences*.

Relative to the Laws and Customs of War on Land." 5) A recommendation that the Powers hold a "Third Peace Conference, which might take place within a period similar to that which has elapsed since the preceding Conference, on a date, to be set by joint agreement among the Powers."⁷⁸

Aside from its inability to agree upon definite plans to secure a limitation of armaments, limited obligatory arbitration, and a real permanent Court of Arbitral Justice, the greatest failures of the Second International Peace Conference at The Hague were: its inadequate Convention Relative to Submarine Mines; its failure to provide a code of rules for the regulation of maritime warfare; and the unsatisfactory character of the Convention respecting the Rights and Duties of Neutral Powers in Naval War. An International Prize Court was agreed upon; but, owing mainly to the wide divergence between the Anglo-American and Continental systems of maritime jurisprudence, it was found impossible to agree upon a code of maritime law which should govern the decisions of the court.⁷⁹

⁷⁸ The attention of the Powers was also drawn to the "necessity of preparing the labors of that Third Conference sufficiently in advance to have its deliberations follow their course with the requisite authority and speed." It was added:

"In order to achieve that object the Conference thinks it would be very desirable that a preliminary committee be charged by the governments about two years before the probable date of the meeting, with the duty of collecting the various propositions to be brought before the Conference, to seek out the matters susceptible of an early international settlement, and to prepare a program which the governments should determine upon early enough to permit of its being thoroughly examined in each country. The committee should further be charged with the duty of proposing a mode of organization and procedure for the Conference."

⁷⁹ On the Hague Conferences of 1899 and 1907, see especially Barclay, *Problems of Int. Practice and Diplomacy* (1907); Bustamanta y Sirvén, *La seconde Conférence de la paix* (1909); Foster, *Arbitration and the Hague Court* (1904); Fried, *Die Zweite Haager Konferenz* (1908); Higgins, *The Hague Peace Conferences* (1909); Holls, *The Peace Conference at the Hague* (1900); Hull, *The Two Hague Peace Conferences* (1908); De Lapradelle, *La Conférence de la Paix*, in 6 R. G. D. I. (1899); Lawrence, *Int. Problems and Hague Conferences* (1908); Lémonon, *La seconde Conférence de la Paix* (1908); Mérignhac, *La Conférence de la Paix* (1900); Meurer, *Die Haager Friedenskonferenz* (1905); Nippold, *Die Fortbildung des Verfahrens* (1905); *ibid.*, *Die Zweite Haager Friedenskonferenz* (1908); Scott, *The Two Hague Conferences* (1909); Renault, *L'Oeuvre de la Hague* (1908). For a very complete bibliography, see De Lapradelle et Politis, in 16 R. D. I. P. (1909), 385-87.

The Naval Conference of London of 1909

In order to find common meeting-ground on some of the most fundamental points of maritime law, a naval conference of the leading ten maritime Powers was held at London during the winter of 1908-09. This conference agreed upon a Declaration consisting of seventy-one articles embodying a code of rules regulating the rights of neutrals and belligerents with respect to neutral commerce. In importance these rules may be compared with those laid down in the famous Declaration of Paris of 1856. They contain important provisions relating to the law of blockade, contraband, continuous voyage, hostile aid or unneutral service, the destruction of neutral prizes, the transfer of the flag, enemy character, the right of convoy, etc.⁸⁰

The science of international law during the nineteenth century

The history of the science of international law during the nineteenth century has never been written. All that can be indicated here are the general tendencies or lines of development and the names of some of the leading authorities.

It may be said that modern writers on international law are increasingly historical and positive, although certain abstract and theoretical tendencies are still very marked, especially on the Continent of Europe. The pure law of nature school has almost wholly

For the texts of the Conferences, see Higgins, *The Hague Peace Conferences*; Scott, *Texts of the Two Hague Conferences*; 2 Scott, *The Hague Peace Conferences*; Whittuck, *International Documents* (1908); and *Int. Law Situations* (1908), 117 ff.

⁸⁰ On the London Naval Conference of 1909, see especially Baty, *Britain and Sea Law* (1911); Bentwich, *The Dec. of Lond.* (1911); Bowles, *Sea Law and Sea Power* (1910); Bray, *British Rights at Sea* (1911); Cohen in 27 *Law Quar. Rev.* (1911) and 26 *Rep. I. L. A.* (1911); *Correspondence*, etc., and *Proceedings* (*Id.* 4554 and 4555, 1909); Dupuis *La guerre maritime*, etc. (1911); *ibid.*, in 18 *R. D. I. P.* (1911), 360 ff.; Harris in 56 *National Rev.* (1910), 393 ff.; Lawrence in 99 *Contemp. Rev.* (1911), 348 ff.; Lémonon, *La Confér. Navale de Londres* (1909); Macdonnell in 11 *J. Soc. Compar. Leg.*, 68 and 26 *Rep. I. L. A.* (1911); Myers in this JOURNAL (1910), 4:571; Niemeyer, *Das Seekriegsrecht* (1910); Oppenheim in 27 *Law Quar. Rev.* (1911), 372 ff.; Politis in *J. D. I. P.* (Clunet, 1909-10); Reinsch in 190 *No. Am. Rev.* (1909), 479 ff.; Renault, *La Confér. Navale de Londres* (1909); Stockton in this JOURNAL (1910), 3:196; Westlake in 67 *Nineteenth Cent.* (1910), 505 ff.; *Int. Law Topics* (1910).

disappeared,⁸¹ but publicists like Wheaton, Manning, Fiore, Pradier-Fodéré, Bonfils, and Piedèlièvre still show the influence of ideas derived from the theories of natural law.

It is perhaps most useful and convenient to divide nineteenth century authorities according to nationality. The leading British treatises in chronological order, are those by Manning, Wildman, Phillimore, Twiss, Sheldon-Amos, Creasy, Hall, Maine, Lorimer, T. J. Lawrence, Walker, and Westlake. Other British writers who have materially contributed to the science of international law in the nineteenth century are Atherly-Jones, Baty, Barclay, Bernard, Cobbett, Harcourt (Letters by Historicus), Higgins, Holland, Philipson, and Spaight. The British publicists are, in the main, overwhelmingly positivist and historical.

In any enumeration of British authorities, the name of Sir William Scott (later Lord Stowell), the founder of British maritime jurisprudence, deserves a place by itself by reason of the important judicial decisions and opinions of that eminent judge.

Among the authorities contributed by the United States are, (chronologically arranged): Kent, Wheaton, the elder Woolsey, Lieber, Halleck, Wharton, Field, Dana, W. B. Lawrence, Pomeroy, Snow, Moore, Davis, Wilson, Woolsey, Jr., Taylor, Stockton, J. B. Scott, Bordwell, Gregory, Hyde and Reinsch.* The judicial decisions of Judges Marshall, Story, and Gray are also of great importance. The American writers are essentially positivist, though perhaps more under the influence of Continental ideas than are British publicists. They are especially distinguished by impartiality and a certain freedom from the national bias which characterizes some of the British authorities.

The leading German and Swiss authorities since 1815 are Klüber, Heffter, Bluntschli, von Holtzendorff, Bulmerincq, Geffcken, Perels, Lueder, Ullman, Liszt, Oppenheim,⁸² Stoerk, Nippold, and Meili.

⁸¹ An exception is Lorimer. See note, *supra*, on p. 34.

⁸² Oppenheim, a German publicist, who has recently succeeded Westlake as professor of international law at Cambridge, England, has published an important treatise in English. His point of view is, however, essentially Continental. Rivier

* The author modestly omits his own name, but the list would be incomplete without it. — J. B. S.

The strong consciousness of military strength which followed the realization of German unity, together with the survival of Bismarckian methods and traditions, appears to have had a deleterious effect upon the development of international law in Germany since 1870, though evidence is not lacking that German publicists are recovering their former interest in this branch of jurisprudence. German idealism combined with German system and thoroughness must soon again place Germany in the front rank of contributors to our science.

If Germany has been losing, France has been gaining interest in international law during the same period. Except for the special studies and collections of Cauchy, Cussy, Hautefeuille, Ortolan, Pistoye et Duverdy, etc., the contributions of Frenchmen appear to have been comparatively slight and unimportant prior to 1870. Since then we have had important treatises by Funck-Brentano et Sorel, Pradier-Fodéré (in 8 volumes), Bonfils, Chrétien, Despagne, Piédelièvre, and Mérignhac. There have also been valuable contributions by Dumas, Dupuis, Fauchille, Féraud-Giraud, De Lapradelle, Moulin, Pillet, Poinsard, Renault, Rey, and many others. The French publicists of the present era are predominantly historical and practical, and a clear style combined with scientific method makes their works, as a rule, remarkably attractive.

The best known modern Italians are Brusa, Cassanova, Carnazza-Amari, Fiore, Mancini, and Pierantoni. Their views have been greatly influenced by Mazzini's teachings on the subject of nationality, which some of them have vainly attempted to erect into a principle of international law.

The leading Spanish and Spanish-American authorities are Alcorta, Alvarez, Bello, Calvo (in 6 vols.), and Olivart.

Among authorities of other nationalities, the following appear especially worthy of mention from the standpoint of general reputation: the Belgian publicists Descamps, Laurent, Nys, Rivier, Rolin,

should perhaps be classed as a Swiss rather than a Belgian publicist, having been born in Switzerland and having served as Swiss Consul-General in Belgium, but I have classed him as Belgian because the greater part of his work was done at the University of Brussels where he was appointed to a professorship as early as 1867.

and Rolin-Jaequemyns; the Russians F. de Martens and Kamarowsky; the Dutch Asser and Ferguson; the Scandinavian Kleen; the Austrians Lammasch and Neumann; the Portuguese Pinheiro-Ferreira and Testa; and the Greeks Saripolas and Streit.

The Japanese have also materially contributed to the science of international law. The works of Ariga and Takahashi enjoy a European and American reputation.⁸³

AMOS S. HERSHEY.

⁸³ The most important *Forerunners of Grotius* were: 1) Alfonso the Wise, King of Castile (1252-84), who, with the aid of collaborators, compiled a mediæval code of law called the *Siete Partidas*, which contained many rules of land and naval warfare. 2) Giovanni de Legnano, professor of law at Bologna, who (in 1360) wrote the first substantive treatise upon the laws of war. His work, which was not published before 1477, was entitled *De bello, de represaliis, et de duello*. 3) Honoré Bonet, a Benedictine monk and a Provençal, the author of a remarkable book which bears the peculiar title of *L'arbre des batailles*. It was written about 1385 and contains 132 chapters on the law of warfare. This work was re-edited by M. Nys, in 1883. 4) Christine de Pisan, perhaps the first advocate of woman's rights, who was born at Venice in 1363 and was educated at the French court. Among the voluminous works of this remarkable woman, there was one entitled *Livre des faits d'armes et de chevalerie*, which is largely copied, with due acknowledgment, from the *Arbe des batailles* of Honoré Bonet. Both Bonet and Christine were far in advance of their age in humanitarian sentiments, but their works were nevertheless highly successful. 5) Bello, an Italian jurist and statesman, who published an important work entitled *De re militari et de bello* about 1558. 6) Victoria (1480-1546), a Dominican monk and professor at Salamanca, whose thirteen *Relectiones theologicæ* were first published in 1557. Two of these, the fifth entitled *De Indiis* and the sixth *De jure belli*, deal with the rights of the Indians and the laws of war. Victoria is probably the first modern thinker who conceived the idea of a society or community of nations based upon natural reason and sociability. It was Victoria who first used the phrase *jus inter gentes*. He set up the doctrine of the solidarity and interdependence of states and placed the rights of the Spanish in the Indies upon the natural rights of commerce and communication. 7) Ayala (1548-84), a military judge in the service of Philip II, who published a treatise in 1581 on the laws of war and military discipline. 8) The great Spanish Jesuit Suarez, who published his *Tractatus de legibus* in 1612. In a famous passage, which is translated by Westlake (see *Chapters*, pp. 26-27), Suarez for the first time clearly states the view that each state is a member of an international community or society of nations which are bound together by the necessity of mutual aid and communion. He also distinguished clearly between international law (*jus gentium*) and the law of nature (*jus naturale*). 9) Gentilis, a

Protestant Italian jurist, who was appointed professor of civil law at Oxford in 1588. His chief work, *De jure belli*, which was published in 1598, and re-edited by Professor Holland in 1877, furnished the model and framework for the first and third books of Grotius' *De jure belli ac pacis*. Gentilis is undoubtedly the most important of the forerunners of Grotius, but lacks the idealism, passion for justice, and broad humanitarianism of the latter. He is the founder of the historical school of international jurists, and is also in some other respects (as, e. g., his advocacy of the rights of neutrals) in advance of Grotius.

On the *Precursors of Grotius*, see especially the voluminous researches of Nys, more particularly his *Le droit de la guerre et les precurseurs de Grotius* (1882); *Les Origines* (1894); *Etudes* (1896 and 1901), *passim*; and *Le Droit Int.*, II, 213-232. See *Les Fondateurs de Droit Int.* (1904), ed. by Pillet for studies of Victoria, Gentilis, and Suarez. See also Holland's *Studies* (1898) and Westlake's *Chapters* (1894) for valuable studies of Ayala, Suarez, Gentilis, etc. Walker's *History and Science of Int. Law*, *passim*; Rivier, in Holtzendorff's *Handbuch* I, § 85; Wheaton's *History* (1845), Introduction; and Kaltenborn, *Die Vorläufer des Hugo Grotius* (1848) contain much valuable information.

On the *History of Int. Law since the Peace of Westphalia*, see especially 1 Alcorta, *Cours de droit int. pub.* (1887), ch. 6, §§ 3-4; Alvarez, *Le droit int. américain* (1910); Bax, *Essai sur l'évolution de droit des gens* (1910); De Boeck, *De la propriété ennemie sous pavillon ennemie* (1882), 1-153; Brie, *Die Fortschritte des Völkerrechts seit dem Vienna Kongress* (1890); Hosack, *Rise and Growth of the Law of Nations* (1882), chs. 8-10; Laurent, *Etudes sur l'humanité*, Vols. X-XVIII; 1 Kleen, *De la neutralité* (1898), *Introduction historique*, 1-70; Leseur, *Introduction*, §§ 41-59; 1 Mohl, *Geschichte und Litteratur der Staatswissenschaften*, 337-475 (1885); 2 Nys, *Etudes*, esp. I, 318-406; on "La révolution française et le droit int.," 2 Ompteda, *Litteratur des Völkerrechts* (1785); Pierantoni, *Die Fortschritte des Völkerrechts im XIX Jahrhundert* (1899, trans. by Scholz); 2 Wheaton, *History of the Law of Nations* (1848), *passim*; *ibid.*, *Histoire des progrès du droit des gens en Europe* (4th French ed. 1865).

Among the treatises which deal with the subject in a more or less satisfactory manner are 2 Bonfils-Fauchille, Calvo, Chrétien, Despagne, Fiore, Halleck, F. de Martens, Mérignhac, 2 Nys, and Taylor.

On the history of the science of international law, see 1 Alcorta, *Cours*, ch. 7; 1 Mohl, *Geschichte und Litteratur der Staatswissenschaften* (1885), 337-475; 2 Nys, *Le Droit Int.*, 213-328; 2 Ompteda, *Litteratur des Völkerrechts* (1785), *passim*; 2 Nys, *Notes sur l'histoire dogmatique et littéraire de droit int. en Angleterre* (1888); *ibid.*, *Les theories politiques et le droit int. en France jusqu'an XVIII siècle* (1899); *ibid.*, *Etudes*, *passim*; *Les Fondateurs du droit int.* (1904), ed. par Pillet; Rivier in Holtzendorff's *Handbuch*, §§ 85-123; Walker, *The Science of Int. Law* (1893), *passim*; Wheaton, *History* (1848), *passim*. Among the treatise, see 2 Bonfils, Calvo, 2 Fiore, Halleck, Manning, Martens Nys, 2 Oppenheim and Taylor.

For bibliographies, see 2 Bonfils, Mohl, 2 Nys, Ompteda, 2 Oppenheim, Rivier in Holtzendorff, and 2 Olivart, *Bibliographie de droit int.*

For treaties, see the collections and summaries contained in Dumont, Flassen,

Gardner, *Hertslet*, Koch, *Martens*, and the *Archives Diplomatiques*. See also SUPPLEMENTS to this JOURNAL, the volumes on the Foreign Relations of the United States, published as *House Documents*, the British and Foreign State Papers, the *Parliamentary Blue Books*, and the documents published in the *Revue générale de droit int. public* and the *Zeitschrift für Völkerrecht*, etc.

The leading available periodicals on international law are as follows: *American Journal of International Law* (since 1907); *Revue générale de droit international public* (since 1894); *Revue de droit international et de législation comparée* (since 1869); *Zeitschrift für Völkerrecht und Bundesstaatsrecht* (since 1907); and the *Annuaire de l'Institut de Droit Int.* (since 1877).

Valuable articles and notes on international law also frequently appear in the *American Law Review*, the *Green Bag*, the *Law Quarterly Review*, the *Law Magazine and Review*, the *Journal of the Society of Comparative Legislation*, the *American Political Science Review*, the *Archiv für öffentliches Recht*, the *Annalen des deutschen Reiches*, and the *Revue de droit public et de la science politique*.

On the *jus naturale*, see Ahrens, *Das Naturrecht* (1846); *Bryce*, *Studies*, Essay, XI, 546-606; Burlamaqui, *Principes du droit naturel* (1747), *passim*; Carlyle, *History of Mediæval Political Theory*, *passim*; Clark (A. I.) on "Natural Rights" in 16 *Annals of Am. Acad. Soc. and Pol. Sci.*, 212-216; *Dunning*, *Political Theories, Ancient and Mediæval and From Luther to Montesquieu* (2 vols.), *passim*; Gierke, *Johannes Althusius und die Naturrechtlichen Theorien*, *passim*; Hibben in 4 *Int. J. of Ethics*, 133-160; Holland, *Jurisprudence* (10th ed.), 6, 30-38; Lorimer, *The Institutes of the Law of Nations* (1883), in 2 vols., *passim*; 2 Lowell, *Government of England*, 477-88; *Maine*, *Ancient Law* (Pollock's ed.), chs. 3 and 4, and Pollock's note in Appendix; Mackintosh, *The Law of Nature and Nations* (1828) (see also his *Miscel. Works*, 27-43); Miller, *Philosophy of Law*, Appendix A, 376-83; Pollock, *Expansion of the Common Law*; Pulszky, *Theory of Law and Civil Society*, ch. 4, 77-83; *Ritchie*, *Natural Rights*, espec. ch. 5; Rutherford, *Institutes of Natural Law* (1832, 2d Am. ed.), espec. Bk. I, chs. 1, 2 and 5, and ch. 9 of Bk. II; Salmond in 2 *Law Quarterly* (1895), 121-43; Taylor (T. W.) in 1 *Annals Am. Acad. Soc. and Pol. Sci.* (1891), 558-85; *Voigt*, *Das jus naturale et gentium der Römer* (1856), in 4 vols. *passim*; Walker, *History*, *passim*; *Willoughby*, *Political Theories*, 249 ff. and 281 ff.; *ibid.*, *The Nature of the State*, ch. 5, 89-115.

THE GOVERNMENT OF THE UNITED STATES AND AMERICAN FOREIGN MISSIONARIES

It is common knowledge that the United States was originally settled either by God-fearing men and women fleeing from persecution, or by political refugees who were unable to bring about reforms which they believed essential to good government and were unwilling to comply with the state of affairs existing in the Old World, or, finally, by those who, unfortunate at home, were desirous of bettering their condition in the New World. The Pilgrim and the Puritan, the Episcopalian and the Catholic, the Quaker, the Presbyterian and the Lutheran settled the Atlantic Coast. The roundhead and the cavalier, the rich and the poor and the inmate of the debtor's prison found themselves side by side upon a plane of equality without the traditions and the conservatism of an older world. Whether the colony was composed of Puritans and manifested intolerance to the protestant brother of a different faith; whether the settlement remained loyal to the Church of England, as Virginia, or favored the Catholic, as Maryland, or freely accepted the law-abiding without questioning his religion, as the Quakers of Pennsylvania, the principle of religious toleration steadily gained ground, and by the time of the Revolution it may be said generally that religious differences ceased to influence men or their conduct toward each other, by virtue of a conception of liberty which embraced not merely the right to and protection of property but the freedom of thought, of speech and of public worship. The example of Virginia, which in 1786 established religious freedom by statute, profoundly influenced the Federal Government and the various States of the Union; for, by the First Amendment to the Constitution of the United States, it is provided that "Congress shall make no law respecting the establishment of a religion, or prohibiting the free exercise thereof," and the States of the American Union have, in their various Constitutions, placed the same restriction upon their legislatures. The amendment of the

Constitution and the like provisions in State Constitutions were not dictated by indifference or hostility to the principles of the Christian religion, but aimed to prevent not merely the establishment of any one form of religion, however widely spread, but to establish upon a firm footing the right before the law of every religious sect.

As the Constitution of the United States prohibits the establishment of any national religion, and as the States of the Union have incorporated this provision in their respective constitutions, it necessarily follows that there neither is nor can be established in the United States a state church. As the United States differs so radically from the countries of the Old World in which a state religion either exists or has existed, to the disadvantage, it is submitted, of both church and state, and as the absence of a state religion and the favored position of its votaries influence necessarily in no small measure the foreign policy of the United States in matters of religion, the status of religious bodies in the United States, as set forth by a learned writer,¹ may be of some interest:

Complete separation of church and state, and complete freedom in religious worship and in the expression of religious belief, are the rules throughout the States. In none of them can preference of one religious sect over another be established by law, or compulsory support, by taxation or otherwise, of religious worship, or attendance thereon, be required, or restraint upon the free exercise of religion according to the dictates of the conscience be imposed. Nevertheless, the common law of the land recognizes the fact that the prevailing religion is Christian, and it will not suffer one with impunity to shock the moral sense by utterances which a Christian community would regard as profane or blasphemous.

* * * * *

The religious societies which exist throughout the States are quite different in their organization from those which exist in England, and still more different in the relations they sustain to the State. They are for the most part formed under general laws; which permit the voluntary incorporation of societies of attendants upon religious worship, under such regulations as they shall see fit to establish for themselves, and with power to hold real and personal property for the purposes of their organization, but for no other purpose. * * *

All questions relating to the faith and practice of the church and its members belong to the church judicatories, to which they have volun-

¹ Cooley's Blackstone, Vol. 1, Editor's note to p. 376.

tarily subjected themselves. But, as a general principle, those ecclesiastical judicatories cannot interfere with the temporal concerns of the congregations or society, with which the church or the members thereof are connected. * * *

Such a society, when duly incorporated, is not an ecclesiastical, but a private civil corporation, the members of the society being the corporators, and the trustees the managing officers, with such powers as the statute confers, and the ordinary discretionary powers of officers in civil corporations. * * *

The church connected with the society, if any there be, is not recognized in the law; the corporators in the society are not necessarily members thereof, and the society may change its government, faith, form of worship, discipline and ecclesiastical relations at will, subject only to the restraint imposed by their articles of association and to the general laws of the State. * * *

The courts of the State do not interfere with the control of these corporations or with the administration of church rules or discipline, unless civil rights become involved, and then only for the protection of such rights.

In a certain sense of the word, the United States is not a Christian nation, for Christianity is not prescribed by statute and the government, as such, is not and can not be interested in any form of religion. In all the essentials of Christianity, however, we are a Christian nation; for the principles of the Christian religion are universally recognized and the right of any citizen or foreigner within our borders to profess in public as well as in private his religious beliefs is recognized and safeguarded by the laws of the land.

If, therefore, the United States, as such, exerts no influence upon the religion of its citizens concerning questions of faith and of individual opinion, in the formation of which the government neither has nor can have any voice, it would seem to follow that the United States, as such, should take no greater interest in the propagation of the Christian faith in foreign lands than it does in the development and growth of religious denominations within its own territory; that is to say, the United States can not well be a party to missionary enterprise in the sense that the missionaries are in any way clothed with an official character, or that they be granted greater rights and privileges by virtue of their sacred calling than other American citizens engaged in lawful pursuits. In a carefully considered dispatch

to the American Minister to China, dated October 19, 1871, the Department of State said:²

The President will see with deep regret any attempt to place a foreign ecclesiastic, as such, on a different footing from other foreigners residing in China. It is a fundamental principle in the United States that all persons, of every sect, faith, or race, are equal before the law. They make no distinction in favor of any ecclesiastical organization. Prelates, priests, and ministers can claim equal protection here, and enjoy equal rank in the eye of the civil law. The United States ask no more in China than they confer at home. Should the peace of the empire be disturbed by efforts from any quarter to induce or compel the government to confer unusual civil rights on foreign ecclesiastics, you will make it plain that the United States have no sympathy with such a movement, and regard it as outside of the treaty rights which have been conferred upon the western nations. Should these demands, however, be complied with, this Government will then consider whether, under the thirtieth article of the treaty of 1858, a similar right will not at once inure to the benefit of all the public officers, merchants, and citizens of the United States. * * *

Except so far as the guarantee of that treaty extends, the President cannot permit the officials of the United States to participate in any attempt to disturb the natural relations between the Emperor and his Christian subjects. He particularly desires it to be understood that the profession of the Christian faith is not regarded by the officers of the United States as a protection against punishment for crime. Ecclesiastical asylums for criminals have never existed in this country, nor will they be planted elsewhere through its agency.

The policy of the United States, to be deduced from this passage, is that missionaries and merchants stand upon an equality in the eye of the law; that every man, whether he be preacher or man of affairs, is first of all a citizen of the United States and, as such, entitled to protection to his person and property so far as international law permits, and the right, whether he be tradesman or churchman, to follow his calling. Just as the United States has entered into innumerable commercial treaties in order to secure for American industry and commerce in foreign parts equal rights and privileges with the native, so the United States has entered into treaties with various countries by the terms of which American mis-

² Foreign Relations, 1871, pp. 154-155.

sionaries are specifically granted the right to reside within the territory, to acquire property necessary for their mission, and to preach the gospel to natives, provided that this be done without seeking to disturb the political organization of the country in which they reside.

Out of the many treaties concluded by the United States for the protection of its citizens in foreign parts, and, more especially, for the protection of American missionaries, the treaties with China alone will be briefly examined in order to deduce from them the policy of the United States in so far as missionaries are concerned.

In 1844 the Honorable Caleb Cushing negotiated the first treaty between the United States and China, and while the privileges to be enjoyed by American merchants are carefully enumerated, missionaries are not specifically mentioned. By the year 1858, however, the importance and advantages of the presence of missionaries for the development of China were so fully recognized that Article 29 of the treaty of June 18, 1858, refers to them specifically in the following terms:

The principles of the Christian religion, as professed by the Protestant and Roman Catholic churches, are recognized as teaching men to do good and to do to others as they would have others do to them. Hereafter, those who quietly profess and teach these doctrines shall not be harassed or persecuted on account of their faith. Any person, whether citizen of the United States or Chinese convert, who according to these tenets peaceably teaches and practices the principles of Christianity, shall in no case be interfered with or molested.

It will be noted that Protestant and Catholic are treated upon a plane of absolute equality, and the nature and scope of missionary enterprise are summed up in a single happy phrase "as teaching men to do good and to do to others as they would have others do to them." The article, however, does not stop here, for it proceeds to say that the Christian may not merely reside in China without interference but that the missionary may profess and teach the Christian doctrine without persecution. So far the missionary is assimilated to the merchant, but the philanthropic nature of the missionary's efforts and the benefits likely to accrue to the native from the propagation of the Christian faith are recognized by the express stipula-

tion that the Chinese convert who peacefully teaches and practices the principles of Christianity shall not be interfered with or molested. This is a distinct discrimination in favor of the missionary, because the Chinese merchant with whom the American trades is not protected by treaty. Ten years later the subject was re-examined and in the treaty of July 28, 1868, the privileged situation of Christian citizens of the United States and of Chinese converts was continued and strengthened by Article 4, the material portion of which provides that:

it is further agreed that citizens of the United States in China on account of their faith, religious persuasion, and Chinese subjects in the United States, shall enjoy entire liberty of conscience, and shall be exempt from all disability or persecution on account of their religious faith or worship in either country.

At the same time "privileges, immunities or exemptions in respect to travel or residence" are conferred upon citizens or subjects of both nations (*id.* Art. VI).

The continued intercourse between China and the United States and the benefits resulting from the self-sacrificing devotion of American missionaries in China, led to the negotiation of the treaty of 1903, in which the privileges and immunities of American citizens, including missionaries, were carefully considered and set forth at length, and, as Article 14 of this treaty not only states in detail the rights of missionaries but at one and the same time indicates the policy of the United States in regard to missionaries in foreign parts, it is quoted in full:

The principles of the Christian religion, as professed by the Protestant and Roman Catholic churches, are recognized as teaching men to do good and to do to others as they would have others do to them. Those who quietly confess and teach these doctrines shall not be harassed or persecuted on account of their faith. Any person, whether citizen of the United States or Chinese convert, who, according to these tenets, peaceably teaches and practices the principles of Christianity shall in no case be interfered with or molested therefor. No restrictions shall be placed on Chinese joining Christian churches. Converts and non-converts, being Chinese subjects, shall alike conform to the laws of China; and shall pay due respect to those in authority, living together in peace and amity,

and the fact of being converts shall not protect them from the consequences of any offense they may have committed before or may commit after their admission into the church, or exempt them from paying legal taxes levied on Chinese subjects generally, except taxes levied and contributions for the support of religious customs and practices contrary to their faith. Missionaries shall not interfere with the exercise by the native authorities of their jurisdiction over Chinese subjects; nor shall the native authorities make any distinction between converts and non-converts, but shall administer the laws without partiality, so that both classes can live together in peace.

Missionary societies of the United States shall be permitted to rent and to lease in perpetuity, as the property of such societies, buildings or lands in all parts of the Empire for missionary purposes, and, after the title deeds have been found in order and duly stamped by the local authorities, to erect such suitable buildings as may be required for carrying on their good work.

It will be noted that the first part of this important article is a re-statement of the provisions of previous treaties, but the concluding sentences are indicative of the policy of the United States towards missionaries and their converts. International law recognizes the right of a government to protect its citizens or subjects in a foreign country in order to prevent discrimination between natives and foreign residents. In countries not admitted to full membership in the family of nations by reason of an imperfect organization or a system of government at variance with Western ideals, greater rights are enjoyed either by virtue of custom or treaty or both, so that, contrary to the principle of equality upon which international law is founded, the Western nations claim and exercise rights inconsistent with full sovereignty, so that, in certain respects, the foreigner is treated as subject to the jurisdiction of the home country instead of being remitted to the laws and customs of the country in which he resides. The status of extra-territoriality is thus created, so far as China is concerned, by treaty between the two countries, by virtue of which the American citizen is withdrawn from the jurisdiction of China in criminal matters and in controversies of a civil nature in which American interests only are involved. Infractions, however, of treaty rights are international and their adjustment is attained through diplomatic channels. It, therefore, follows that the rights

granted by treaty are under the peculiar protection of the United States, and that the violation of their letter and spirit leads inevitably to diplomatic representations. But however great and extensive these rights are, it is of the utmost importance to missionary enterprises that the missionaries conform in the exercise of their rights to the local customs and regulations, so far as they are applicable and not inconsistent with the rights specifically granted by treaty. Otherwise, friction arises and there is great danger either that the treaty be abrogated, or that its provisions be violated indirectly in such a way as to render the continued presence of the missionaries impossible or to interfere so seriously with their efforts as to check the progress of their work.

Without attempting to examine in detail the status of the missionary in China, it is at once evident that an American mission in China can not advance the cause it has at heart without a right to rent or lease property or to acquire property upon which to erect buildings necessary for the prosecution of its work. As the result of friction or ill-feeling, however, the Chinese authorities may be unwilling to permit the acquisition of property, and it may become necessary for the United States to extend its good offices, or, through diplomatic channels and by diplomatic pressure, to secure for the missionaries the property necessary for the mission, the right to acquire which is specifically granted by the treaty. Without going into detail, it may be said that the Government of the United States has frequently been called upon to aid missionaries to secure title to real estate, not only in China but in other countries where American missionaries reside, for the purpose of extending their religion; otherwise, it would be possible for the unfriendly government to place restrictions upon the transfer or acquisition of property, which would in fact, if not in theory, prevent the transfer of title and thus violate an express provision of a carefully considered and beneficial treaty.

As is well known, the missionaries have not confined themselves solely to the conversion of the native, but have endeavored to raise the standard of living and comfort, and, by the establishment of

schools, hospitals and other charitable institutions, to promote the material welfare of the native as well as to inculcate the doctrines of Christianity. As these institutions, with whose daily benefits we are happily familiar, have met with opposition, and, indeed, have been destroyed by mob violence, it has been necessary for the United States to intervene for the protection of such property, and, in case of destruction, to exact such indemnity or compensation as will permit religious societies to make good the losses so suffered. The history and importance of Robert College in the development of the Balkan Peninsula, to take but a single example, show the inestimable benefits that institutions of learning, due to American initiative, have conferred and undoubtedly will confer upon civilization, and it is eminently right and proper that our Government should take all measures consistent with international law to protect charitable institutions, such as hospitals, from destruction at the hands of those for whose benefit, and for whose benefit alone, they have been created.

The article under discussion calls attention to the rôle which the missionary should play in the land of his residence; for, if he attempts in any way to interfere with the political development of the country where he is located, he not only involves the home government in controversy but defeats the purpose of the mission. Therefore, the treaty specifically provides that "missionaries shall not interfere with the exercise by the native authorities of their jurisdiction over Chinese subjects." A failure to comply with this provision would undoubtedly cause the United States to withdraw protection to the missionary or to the mission implicated, because such action would be not merely inconsistent with the treaty but a distinct violation of its express terms. Fortunately, such instances are rare, although they are not unknown in practice.

International law not only allows but, indeed, requires a government to protect its citizens in foreign parts where the foreign government is either unwilling or unable to grant requisite protection; but international law, except in extreme cases, does not admit the right of one government to interfere in the purely domestic affairs of another. The claim, therefore, of a government to object to the

laws and customs of a foreign country in so far as they apply to its own subjects or citizens, is tantamount to a claim of intervention, which can only be based upon express treaty provisions; for the right of interference, although not expressed, is limited to interference in behalf of one's citizens or subjects. As, however, the propagation of Christianity in foreign parts is regarded as of inestimable advantage to the native population, nations have bound themselves by treaty to permit such propagation and, indeed, to further it. Thus, in our treaties with China the missionaries are not only allowed to teach the principles of Christianity, but the converts to the Christian faith are permitted to teach and practice Christianity without molestation, provided it be done peaceably. In order to give full effect to this provision, the treaty of 1903 declares that "no restriction shall be placed on Chinese attending Christian churches;" but, lest the conversion of Chinese subjects to Christianity shall interfere with the orderly development of China and hamper the government in administrative matters, it is provided that "converts and non-converts, being Chinese subjects, shall alike conform to the laws of China," and that they shall be subject in their purely political and domestic relations to the laws of the land. There is, however, a very liberal provision that converts shall be exempt from "taxes levied and contributions for the support of religious customs and practices contrary to their faith."

Without entering into further details, a single concrete case may be taken from the recent diplomatic correspondence of the United States, in order to show the interpretation placed upon the treaty rights and the policy of the United States in protecting and advancing missionary enterprise.

On October 28, 1905, the American Presbyterian Mission, stationed at Lien Chou, in the Province of Canton, was attacked and destroyed by a mob, and in the course of the destruction five missionaries were killed. The attack seems to have been due to the refusal of the missionaries to allow the village people to fire off a cannon upon missionary property during a native festival. Without attempting in any way to criticize the action of the missionaries in refusing permission to place and use the cannon upon the property

of the mission, the occurrence shows the necessity of avoiding, even in the smallest matters, a line of conduct which may in any way alarm native susceptibility.

In the ordinary case, where an American citizen domiciled in a foreign country sustains injury to property or loss of life, the local authorities would apprehend the guilty parties, pass them before a court of justice, and by adequate punishment meet the requirements of the law. In such cases questions of indemnity would be excluded, although an action would lie against the perpetrator of the outrage for the value of the property destroyed: the local government would not be taxed with responsibility unless connected with the outrage or was guilty of negligence amounting to complicity. A sudden outburst of a community, unexpected under ordinary circumstances, of such a nature as the local authorities could neither foresee nor control, would not of itself justify diplomatic representation, much less a demand for indemnity. If, however, the guilty persons were not brought to trial and punishment, this would be regarded as a denial of justice, and would permit a settlement through diplomatic channels with a proper indemnity for losses incurred. Even if legal proceedings were instituted, still, if the punishment were inadequate or not inflicted, the foreign government would render itself liable in accordance with the ordinary principles of international law and procedure.

The question, however, in the instance referred to, was complicated by treaty stipulations and the existence of extra-territoriality. The United States, therefore, insisted that compensation be made to the Presbyterian Mission for the destruction of the Mission, including a well-equipped and extensive hospital, and that, in view of the peculiar atrocity connected with the murder of the American missionaries, indemnity should be paid by the Chinese Government for the wanton murder of the missionaries, as well as compensation for losses actually sustained by American interests. As the result of the prompt intervention of the United States, an indemnity was paid to the relatives of the American victims at Lien Chou, and properly so, for the assault upon the missionaries resulted not merely in their death, but also in an injury and insult to the United States of which they were citizens. It may be stated that the death of one of the missionaries not only blotted out a life of great promise and singular

The policy of the United States, therefore, is to regard the missionary as a citizen, and, in the absence of specific treaties granting exceptional rights and privileges, to extend to him the protection ordinarily accorded to American citizens in foreign parts; to advance missionary enterprise in so far as it does not raise political questions and interfere with the orderly and constitutional development of the country in which the mission is located; to favor the mission in all proper ways; to protect the missionaries not only in their places of residence but in traveling through the country for the purposes of the mission; to secure for them the right to hold property, without which, in many cases, the efforts of the mission would be frustrated, and to obtain for them the right not merely to exercise in private but to profess in public the doctrines of Christianity; to establish schools for the education of their children and of the native population in whose midst they are situated, and to protect from assault and destruction hospitals and other charitable instrumentalities.

In conclusion, as setting forth in a few brief paragraphs the policy of the United States, the sphere and function of the missionary and the conduct expected from him, attention is called to the circular letter of Mr. George F. Seward on assuming charge of the American Legation in Peking in 1876, printed as an appendix to this article.

JAMES BROWN SCOTT.

4

APPENDIX

HONG-KONG, March 3, 1876.

SIR: Upon assuming the duties of the ministership, I find that a majority of the grievances coming to me for representation to the Imperial Government are those of our citizens who are missionaries. This fact leads me to address to you, in common with our consuls in China generally, some remarks as to this class of cases.

It is entirely true that a large part of the business of the legation in the past has been of this kind. At all the ports in China, Shanghai only excepted, the missionary residents coming from America largely outnumber all other citizens of the United States. Probably

more than one-half of our whole representation in China are the messengers of the Christian system. These belong to a class who, in the pursuit of their work, are likely to meet difficulties. They go into the interior to preach and to reside, while our merchants confine their work essentially to the ports. Their business is to displace existing religious systems, and in doing so they must necessarily arouse antagonism. With them zeal is a duty, and the conservative disposition which grows up when property is at stake is wanting. In many of our mission establishments the central control is not strong, and each individual, be he discreet or not, is more or less free to work out the bent of his disposition.

Looking to these facts it may well be expected that for the future, as lately and in the past generally, missionary cases will continue to call for a great share of the efforts of the legation.

If such a remark should be predicated of any legation at our own capital, it would attract general attention, and the whole tendency involved would be subjected to anxious examination.

In making these remarks I recognize fully the leading facts, first, that the sympathies of the American people wait upon the efforts of the missionaries; secondly, that their efforts tend undoubtedly to the moral and physical advancement of the peoples among whom they are so generously expended; and, thirdly, that in my observation our missionaries are thoroughly imbued with the American idea that church and state should be separate, and that the former should rely upon spiritual weapons in conducting spiritual contests.

The fact remains, however, that missionaries do from time to time get entangled in difficulties. They are assaulted, their converts maltreated, their mission-houses, chapels, dispensaries, and book-shops are pillaged and destroyed, or if none of these things happen, they find difficulty in securing houses and lands from which to carry on their work. In all these cases they appeal to the consuls, and as a last resort to the legation. It will continue to be so, so long as the West is Christian and the East adheres to other systems.

We are all agreed, then, as to the facts, and in regretting the situation which virtually establishes our political representation as the

right arm of the propagandists of the Christian faith. What shall be done to make this condition of things as little to be regretted and as little awkward as possible?

I may say that the Government of the United States is not likely to forget that a missionary has the rights of an individual and that while we do not bring the power of the state actively into the advocacy of the Christian system, we can not consent that that power shall be exercised anywhere against our people who are its adherents, because of their religion, or that they shall be subjected to abuse for this reason. We accord freedom of conviction to all within our borders; and within the bounds of a just discretion, we appeal to all mankind to favor the same principle.

But there is always this just discretion to be observed, whether it be on the part of the state, the officer, or the missionary. The missionary of right views would not readily pardon the officer who should fail to grasp a given case in all its bearings, and should by the exercise of undue zeal, or undue caution, jeopardize his work. The liberal Christian desires only that the state shall give the religious element an open opportunity. And so in turn the state and the officer may ask the missionary to have some of the "wisdom of the serpent," to be forbearing and long-suffering, to avoid places which are dangerous, to deal respectfully with cherished beliefs, erroneous though they be, and generally to carry on his work with such good management, good feeling, and tact, as to arouse the least possible animosity, and to draw the Government as little as may be into the arena of discussion and conflict.

This letter has, then, this purpose, to represent to the missionary the ground which his Government and its officers may rightfully take. It is a plea that they shall not embarrass us unduly, and that they shall yield to us consideration as they expect it from us, to the end that the best results for all may be worked out.

I wish you to call together the missionaries at your port and to read this letter to them, or to bring it to their attention in some convenient way, and to say that I shall be glad to receive an expression of their views upon the subject, to be communicated to me in such manner as you and they may see fit.

I add a word to yourself as to the course to be taken in missionary troubles. Be content in searching out the facts and in putting these before the native authorities. Make no explicit demands for this or that mode of settlement. Deal with all cases as if the authorities were well disposed, and with patience, avoiding in every way all that is likely to cause unnecessary irritation. Procure settlements as promptly as possible, and do not scrutinize the terms over-rigidly. Refer as few cases as possible for the action of the legation, but keep it fully informed of each step of your procedure. In fact, exercise on your part at all points that discretion and tact which we ask from the missionaries, and for the lack of which no officer can be entirely excused.

You are at liberty to give a copy of this letter to any one wishing it. In doing so, however, it must be understood that it is not open for publication.

GEORGE F. SEWARD.

BULGARIAN INDEPENDENCE *

[Being the fourth part of a series of Studies on the Eastern Question. The preceding parts appeared in the January, April and July numbers of the JOURNAL for 1911.]

Since the publication of our last article, the political independence of Bulgaria has been juridically established from the constitutional point of view.

As we have already seen, the Bulgarian diplomatic and governmental situation had been developed in fact, without ever having been theoretically or diplomatically discussed. This is natural. The Bulgarian Government took great care not to raise that question, contenting itself from the internal point of view with Art. 17, of the Constitution of Tirnovo, which gave to the Prince, in general, the conduct of diplomatic negotiations. It might have been contended that Bulgaria, which was a vassal state, had no absolute right to make purely political treaties; and it is doubtful that King Ferdinand, before the establishment of Bulgarian independence, had ever entered into any written political treaties. Moreover, if he had, it would have raised an internal constitutional question; for, in such case, it would have been incumbent upon him to refer the matter to the *Sobranjé*.

With independence established, it became, therefore, important to modify in this respect the constitution, both from the internal and from the external point of view. And this has just been accomplished. The Great Assembly, entrusted with the revision of the constitution, which the Malinoff cabinet hesitated to convoke, was summoned to meet upon the fall of that ministry, June, 1911. It terminated its work on July 18, and despite the aggressive opposition of the agrarian and the social democratic wings of the Left, it voted in the first place to change the princely titles into royal titles, and

* Translated by courtesy of Dr. Theodore Henckels, of Washington, D. C.

then the proposed amendment to Article 17, thus granting to the King the absolute right to conclude secret political treaties.

The conquest of political independence is, thus, definitively accomplished.

But, we have still to see how, in part by progressive policies, and in part by sheer force, the conquest of the economic independence of Bulgaria was established.

ECONOMIC INDEPENDENCE

Economic independence is not less necessary for a people than political independence. If it may not freely manage its financial resources, if it is not master over its customs imposts, over its foreign trade, over its transportation facilities; in a word, if it is under the economic dependence of one or several states, and especially of one or several neighboring states, then it participates only under their control, with such limitations as they may see fit to establish, in the international commerce, which is an essential right of every member of the community of states. To illustrate, we will consider Servia as an example. Servia, because of her geographic situation, is under the economic dependence of Austria, which, by closing her markets to Servia, can ruin the latter's exportation of staple goods, of cattle especially, and reduce her to impotency in the most crucial political questions. Likewise, Bulgaria has suffered under certain economic servitudes, which, although not interfering absolutely with her liberty, were, nevertheless, a great handicap. The treaty of Berlin had woven the greater part of these bonds, the Rumelian revolution had allowed some of them to continue to exist, Bulgaria herself had created some of them.

INTERNATIONAL COMMERCE, CUSTOMS

The bases of the Bulgarian economic régime (policy) are laid down in Art. VIII of the Treaty of Berlin. From the purely commercial viewpoint, Bulgaria was not free. In permitting the Christian sections to separate from the Turkish body, Europe performed at times showy acts, but never meant to sacrifice any of her materi-

interests. The commerce of the great Powers possesses in Turkey too high privileges ever to be willing to surrender them in the provinces politically liberated; and diplomacy protects the interests of Turkey by guaranteeing to her in the new states, provisionally at least, a policy of equal privilege. In this way, the creation of these new states may remain indifferent to the commerce of importation for which the Balkan peninsula still remains one integral unit for exploitation. It is this, which led the Powers at the time of the Treaty of Berlin to maintain in Bulgaria for the present at least, the commercial treaties of Turkey.

This decision brought as a result a proposition for an additional article, presented by the plenipotentiaries of Austria-Hungary, France, and Italy, worded as follows:

The treaties of commerce and of navigation, together with all the conventions and international arrangements concluded with the Porte, as in force at the present time, shall be maintained in Bulgaria and in Eastern Rumelia, and no change shall be made therein with regard to any Power unless Turkey has manifested her approval thereof. No transit impost shall be levied in Bulgaria and in Eastern Rumelia upon merchandise passing through this country. The natives and the commerce of the Powers shall there be treated on the basis of absolute equality.¹

This clearly means, that from a commercial view point, Bulgaria was to be left under the old régime, since the treaties concluded with the Porte, and referred to in this article as in force, were to be maintained. And what emphasizes this impression is on the one hand the assimilation with Rumelia, and on the other the clause depriving the Principality of the right to levy transit tolls, so that while crossing the Bulgarian frontier, the merchandise was looked upon as entering into Turkish territory. This was a strange way of tying the hands of the future rulers, of rendering them absolutely incapable of directing the activity of Bulgarian producers along lines that they might adjudge most profitable, of reducing them even to complete inactivity. Autonomous Bulgaria was destined, however, to enter into an economic development different from that of Turkey.

¹ *Yellow Book*, Protocol No. 5, p. 99.

Either autonomy signifies nothing, or else it means that the autonomous land shall, henceforth have a life of its own. But they would have her live the same economic life as before, and repeat the errors of a social group from which she had separated by main force, for the very reason that their diverging interests had become unbearable.

This anomalous situation could not continue. A first treaty of commerce with England was negotiated in 1887; subsequently, through a series of other conventions with France, Austria, Italy, Belgium, Germany, and her neighboring states, Bulgaria slowly succeeded in freeing herself from her economic shackles. She established her own tariff, and levied a specific tax upon imported merchandise. From 1879 to 1887, she had been compelled to respect the customs policy of Turkey, a taxation *ad valorem*, from 8 to 14 per cent. The first general tariff dates back to 1887. No time was lost in regard to this question because it was thought that a customs union might be negotiated with Servia, which failed, however, and also because the eventual right to conclude such unions was implicitly recognized by the Powers.² This liberation is posterior to the union with Rumelia; and in this matter this very union had brought about the most threatening difficulties.

Reinforcing in Rumelia the economic policy just described, the Congress of Berlin had taken the greatest care not to join commercial autonomy with administrative autonomy. In leaving Rumelia under the sway of the entireness of the conventional right in force in Turkey,³ the treaty subjected her to the same international economic régime as the rest of the direct dependencies of the Porte. The European commission conformed to this in its elaboration of the organic statute when it decreed that the empire and the province should form one and the same customs area,⁴ and that the imperial customs line should follow the Bulgarian frontier.

² See, for example, Article 20 of the Franco-Bulgarian convention of 1906; Article 15 of the convention of December, 1896, with Austria, etc.

³ Treaty of Berlin, Art. XX.

⁴ See Art. 197 of the organic statute: "There is no customs tariff between Eastern Rumelia and the rest of the provinces of the empire. In consequence, the products of Eastern Rumelia and merchandise imported into it have free

The union of the two Bulgarias modified entirely this condition of things. Of their own free will, the Turks moved the customs line to the Rumelian frontier, caring little or nothing about forming a customs union with the greater Bulgaria; rather, hoping to turn the customs into a weapon against the revolted vassal. But the Rumelian commerce of imported merchandise, which from Europe went by way of Constantinople, soon felt the effect of a double tariff, since it was subjected to a tariff at the Rumelian frontier after having already paid a tariff upon its entrance into Turkey. Austria alone was benefited by this course, for the customs union offered a new field to her products which entered unobstructed instead of having to pass either through Bulgaria or by way of the Danube and of Bourgas. Upon the initiative of the chambers of commerce of Constantinople and of those of France that were more particularly affected, the Powers addressed a memorial to the government at Sofia. It threatened to withhold approval of the act of Top-Hané, unless satisfaction were given in this matter, a threat, moreover, which was of no avail, since the act of Top-Hané unfolded its consequences without the approval of Europe. Nevertheless, the Bulgarian Government gave assurances, the tariff upon outgoing merchandise was reduced to 1 per cent. for all products that came from Turkey, but the customs line was maintained. The subsequent amelioration of transportation facilities, of the harbors especially, reduced the advantages formerly enjoyed by European merchandise entering by way of Turkey, and treaties of commerce included henceforth Rumelia and Bulgaria. The Principality had known how to acquire the right to close her frontiers on all sides, and to direct at her will the policy of her importations and exportations, that is to say, to regulate her internal commercial and industrial activity.

Does this mean that her commercial liberty was complete, and that,

access to and circulate unrestricted in the rest of the provinces, and, reciprocally, the products of the rest of the provinces *and merchandise imported into them* have free access to and circulate unrestricted in Eastern Rumelia." Article 196 drew a deduction from this unity of customs area: "Customs tariffs are levied by the administration of the domains of the province, according to the treaties and according to the tariffs in force in the empire."

consulting her own interests only, she might at her will regulate the policy of her importations and exportations? No, not yet; for the Treaty of Berlin forbade it, and always will forbid it for two reasons; and nothing warrants us to say that independence has removed her incapacities on this point. In the first place, according to Article VIII, the natives and the commerce of all the Powers must be treated in Bulgaria on the basis of absolute equality. As has been remarked elsewhere, this is equivalent to promulgating the obligatory insertion of the most favored nation clause in all the Bulgarian treaties of commerce. This would not mean so very much, the clause being rather generally rhetorical in nature, and working only relative embarrassment; its interpretations are wide and its sphere of application singularly variable. But the article in the Treaty of Berlin is absolute, and seems indeed to exclude every kind of direct or indirect tax or any preference whatever. It is only with regard to Turkey that the Powers have permitted Bulgaria to overlook any rigorous observance of equal treatment. Servia was similarly taxed at Berlin with the same servitude.⁵

But, through the desire to preserve from the economic point of view the integrity of the Ottoman Empire so favorable to their privileged commerce, the signatories to the Treaty of Berlin have imposed upon Bulgaria,⁶ as well as upon Roumania⁷ and upon Servia a last economic incapacity; these three states are inhibited from levying transit toll upon merchandise passing through their territory. This is as much an economic as it is a financial servitude; but nothing maintains, from the commercial point of view, the desired integrity of the Balkan peninsula. The coming of full independence could not yield any different results with respect to this matter than came from the creation of the semi-sovereign state; and only an agreement between Bulgaria and the Powers interested can bring about an abandonment of their privilege.

In a general way, from the commercial point of view, the recogni-

⁵ Art. XXXVII of the treaty.

⁶ Art. VIII.

⁷ Art. XLVIII.

tion of Bulgaria as an independent kingdom can bring to her only an indirect advantage; to give full power to exercise her right of treating with the other states and to deprive the latter of every pretext to give to each other and have bought for them severally a condescending attitude.

The proclamation of independence, from a certain point of view, might even have cost her dearly. Bulgaria had in effect concluded with the suzerain Turkey certain most advantageous treaties of commerce, which renewed to the profit of the Principality the ancient economic union. By removing all taxes on imported Turkish products, of little account at best, the government at Sofia had obtained a highly advantageous régime for her exportations into the empire. These consist in major part of cattle and produce; but there are also imported certain manufactured products, lace-works, and in particular the "cheïaks," a sort of coarse cloth of which the Turkish army uniforms are made, and whose exportation, almost entirely free from tariff duty has risen from 18 or 20 million francs to more than 40 million annually. Almost the very first thing Turkey did upon learning of the proclamation of independence, was to raise the duties to 11 per cent., a quasi-prohibitive tariff, and to make use of a new politico-economic weapon against all Bulgarian merchandise, which she has lately so thoroughly perfected and generalized: the boycott. But this state of affairs has come to an end, a provisional *modus vivendi* having been established until the negotiations between the two countries which promise to come to a satisfactory issue, shall have put again into effect a commercial régime analogous to the treaty of commerce of 1907, which contained features of a quasi-customs union.

POST AND TELEGRAPHS, LIGHTHOUSES

When a state has the power to enact its own tariff, it means that it already controls its transportation means, at least in part. If not, then the state is sovereign in name only. To be sure, it has not the right definitively to close its gates to commerce and to international relations except under the penalty of placing itself without the pale

of the community of states; but it has the right to restrict or to open wide, according to conditions of which it alone is the judge, the gates of its territory to international circulation. If this were true only from the point of view of sanitary protection, the legitimacy of this attitude is evident. With regard to national security, military protection, protection of home labor, immigration, the election of domicile by aliens, this attitude imposes itself equally upon the mind of the thoughtful. The control at least, and the supervision of the railways, the postal and telegraph service, etc., belong eminently to the essential services of the state.

Upon all these matters, to be sure, Bulgarian sovereignty had, properly speaking, not been limited. The *Sobranjé* has always freely voted the laws with regard to epizootic diseases and also the laws regarding sanitary protection that it deemed proper. The Bulgarian Government has itself freely created and developed its postal and telegraphic system, and, in principle, its railroad system.

And yet, the Turkish heritage, in Northern Bulgaria as well as in Rumelia, has weighed heavily upon the government's activity, and in particular with regard to the railways.

When examining the Turko-Bulgarian protocol of Constantinople, we discover forthwith in four of its articles the regulation of difficulties of this kind. Three of these four articles are of slight importance, and we pass them by rapidly.

The first refers to the Rumelian posts and telegraphs. Elsewhere we have had occasion to refer to the rents which the Provincial Government was paying to the Imperial Treasury. But, in addition to these rents, the Ottoman Government levied upon the province certain revenues reserved to the empire: customs revenues, and in particular post and telegraph revenues.⁸ The payment of the customs revenues

⁸ Organic Statute, Chapter I, Art. 16: "Eastern Rumelia contributes to the general expenses of the Empire in the proportion of three-tenths of her revenues, not counting those reserved to the Empire." Art. 17: "The customs and the post and telegraph revenues of the Province are reserved to the Empire. The financial administration of the Province forwards the net balance thereof to the Imperial Government according to the dispositions of the present statute and according to the rules and regulations annexed thereto."

did not lead to any negotiations, for the reason that a definite payment of a sum representing the customs revenues, amounting to 5,000 Turkish pounds, was included in the amount of the dues.⁹

Regarding the post, telegraph and telephone revenues, the Bulgarian Government acknowledged itself the debtor of the Empire for an amount of 110,000 francs.¹⁰ On this point we shall not review in detail the Turkish claims. It will be sufficient to state that in 1906, an arrangement had been concluded between the two governments upon this same matter. In virtue of this arrangement the government at Sofia consented to reimburse the Imperial Government for the wires and apparatus destroyed by the Russian troops during the war of 1878; it also acknowledged itself debtor of the Empire in the amount of 60,000 piastres for Imperial postage-stamps delivered by the administration of the Empire to that of the Province, and of half of the postal revenues, and all of the telegraph revenues.¹¹

The second article of the protocol to which we have referred,¹² deals with the International Sanitary Commission established at Constantinople, which levied a tax for the visit and for the granting of licenses to Ottoman vessels. The Bulgarian vessels, like all the other vessels in the Imperial harbors, having been benefited by this

⁹ Organic Statute, Chapter VIII, Art. 195: "The equivalent of the net annual balance of the customs revenues, appraised at the fixed sum of 5,000 Turkish pounds, is due the Imperial Government."

¹⁰ Turko-Bulgarian protocol, Art. 3.

¹¹ This, in virtue of Article 198 of the Organic Statute, which reads as follows: "By way of compensation regarding post and telegraph revenues, it is agreed as follows: 1st, the Imperial Ottoman Government furnishes to the Government of the Province the quantity of special postage-stamps necessary to the postal service of the Province; 2nd, half of the amount derived from the sale of said postage-stamps is to be paid over to the central government; 3rd, the other half accrues to the Province to cover the expenses of the post and telegraph administration, said expenses being borne by the Province; 4th, a special set of books is to be kept for recording the receipts deriving from the international telegraphic correspondence. This category of receipts are to be turned over by the general government to the Imperial telegraph administration in conformity with the existing laws."

¹² Turko-Bulgarian protocol, Art. 5.

arrangement, the Bulgarian Government pledges itself on this account to pay a sum approximating 60,000 piastres.

Finally, in the third article, an indemnity of about 100,000 francs is similarly stipulated¹³ in favor of the lighthouse company. This company, which is French, having secured the concession for building and exploiting lighthouses in Turkey and on the coast of the Black Sea belonging to Bulgaria and Rumelia, it was found that the Bulgarian Government had been levying tolls in the place of the concessionnaire, in part dispossessed on the Bulgarian coast, but left in full possession of its exploitation along the Rumelian coast. The Bulgarian Government, moreover, it would seem, intends to leave the company in the full enjoyment of its rights until the concession shall, in the natural course have ended.¹⁴

Customs, lighthouses, posts and telegraphs, the negotiation of all these matters presents the clear character of an arrangement of things that have vanished. These were matters regarding which no serious difficulty could have arisen to imperil the recognition of independence. The question of railways is quite a different one. The daily press has made much of it; it has ~~been~~ the cause of negotiations of a very thorny nature.

EASTERN RAILWAYS

It is of vital necessity for a state to have control over the agencies of public communication, especially over railways and posts. From the internal point of view, their proper operation is indispensable to the economic prosperity of the nation. From the external point of view, the state, through them, is put into touch with the rest of

¹³ Turko-Bulgarian protocol, Art. 4.

¹⁴ See dispositions in the Organic Statute regarding the lighthouse company. Art. 199: "An official of the lighthouse company is attached to the Sanitary Service at Bourgas to levy the lighthouse tolls in conformity with the existing tariffs, and in accordance with the rules and regulations in force." Art. 200: "The expenses for installing and maintaining the lighthouses are incurred by the concessionary company." Art. 201: "If the necessity for new lighthouses along the shores of Eastern Rumelia is clearly shown, they shall be erected after a preliminary agreement with the Province."

the world. Through them, likewise, the state provides all the needs of governmental action, and in case of need, provides the means for its own security. We can not imagine, for instance, that the state should be willing to tolerate within its territory a railway system exploited by a foreign company, and not have the power to proceed against such system, or should be willing to tolerate within its territory railway lines owned by some other state. This, however, was the situation in Bulgaria. The Treaty of Berlin, Art. XXI, stipulated: "The rights and obligations of the Sublime Porte with regard to the railways of Eastern Rumelia are integrally affirmed." This fact was obvious, since the Province continued to form an integral part of the Ottoman Empire. At the time of the reunion of the two Bulgarias, the situation might have been modified, either by direct agreement between the Principality and the Porte, or in the act of *Top-Hané*. But it was not. It does not appear that the question was at all agitated by M. Tzanoff, the Bulgarian negotiator, who was first of all bent upon securing recognition of the accomplished fact; and Article XXI, therefore, remained in effect.

There were two lines of Rumelian railways. The central line, from Moustapha-Pacha, frontier of Rumelia and of Turkey, to Vakarel, frontier of Bulgaria and of Rumelia. This line, part of the Paris-Constantinople line, has in Turkey a branch line to Dédéagatch, commercial harbor on the Aegean Sea.

The second Rumelian line was only a local line, the beginning of a line which it was intended should connect Constantinople with the Danube, via Choumen; it connected with the main line at Harmanli, ending at Yamboli in the plain south of the Balkans.

The operation of these two lines was entrusted in 1885 to the Eastern Railway Company, an international company whose administrative and technical headquarters were in Vienna and Constantinople, respectively, and whose personnel and directorate were entirely independent of the Bulgarian Government.

Desirous of utilizing the means within its reach, after building a junction line between Sofia and Philippopoli, the Bulgarian Government extended the local line from Yamboli toward Bourgas. This

Rumelian harbor had indeed no means of communication with the interior and Turkish outlets only were open to Rumelian products. It meant the building of a railway line about 110 kilometers in length. The law of January 22, 1889, directed the responsible government to proceed to the execution of the project, and the line was opened to traffic in May, 1890.

The effects of dependence were immediate; dependence deprived the government of the power to control railways, and in particular of the right to enact a tariff law. The Eastern Railway Company saw in the new Yamboli-Bourgas line *the* competing line which would naturally deflect toward the Black Sea, the company's natural terminal, all the products of Eastern Rumelia, to the detriment of Dédéagatch and Constantinople, and of the traffic of the principal line as well. Since the Eastern Railway Company controlled the local Harmanli-Yamboli and Bélova-Harmanli lines, and the products not only of Rumelia, but of Northern Bulgaria and of Sofia had to use its railway system, the company found it an easy matter to accomplish, by means of its tariffs, a deflection of the traffic toward the Aegean Sea, and to render the harbor of Bourgas inaccessible through the high cost of transportation. This harbor, which had cost Bulgaria more than eight million leva (francs) was in this manner blockaded from the land side.

Immediately the government at Sofia began to search for the means to relieve the situation. It was at first proposed to repurchase the Eastern Railway system; but, in view of the presumptions of the company, it became necessary to assume a different attitude. It was decided to build a parallel line, which, starting from the Rumelo-Bulgarian frontier should effect a junction at Bourgas and pass through the whole of Rumelia.

The blow penetrated the company to the quick. It feared the parallel operation and resolved to offer to the Bulgarian Government to repurchase the operation of its system (1898); the agreement arrived at was on the basis of the average revenue for the last five years capitalized for a period of 50 years, or a total of 24,850,863 francs. The Sobranjé ratified the agreement. But where find the

twenty-five million francs? The project for a loan was elaborated, but a lender had to be found; moreover, the company had entered into conversation with the financiers of Vienna and Paris, and a veritable financial boycott was decreed. The Minister of Finance, M. Teneff, and the Minister of Foreign Affairs, M. Natchevitch, went together to Vienna in the hope of securing the loan. The financiers, however, threatened to demand the destruction of the work begun on the Tchirpan-Nova-Zagara line as a condition for the re-establishment of Bulgarian credit. The Bulgarian officials obtained but one offer: the renting of the line by the Eastern Railway Company at a ridiculous rental, which meant its indirect but eventual sequestration. They had to promise also that the construction of the parallel line should not be resumed, nor that the construction of any other similar line should be undertaken within twenty-five years. The convention was signed March 15, 1899. Still, the loan could not be realized; the government had to be satisfied with an advance sum of thirty million in the form of treasury bonds guaranteed by the tax on tobacco. And lastly, the Sultan having refused his consent to the repurchase of the concession, it became necessary to heed his decision since he was an interested third party.

The evident result of the negotiation had been to lead the Bulgarian Government to abandon the parallel line and to tie its own hands.

If, moreover, it had been possible to liberate Bourgas, it would have proven an inefficient palliative. For, the trouble was of a wider nature, it had its root in the very fact of foreign operation, according to M. Bousquet:¹⁵

This company treats with the Bulgarian Government as one government does with another. It takes no account of the interests of the country through which it passes, or subordinates them to its own, organizes its services, and establishes its tariffs not with the view of bringing the greatest possible sum of advantages to those regions through which it operates, which, in a new country, should be the object of the administration of a state, but solely with the aim of increasing its receipts. One can not very well blame it for thinking above all things of the dividends

¹⁵ Bulgarian Railways, 1910.

of its stockholders, but it is obvious that the interests of a private exploitation do not generally comport with those of a good national economy.

These economic grievances had exasperated the Rumelian population. To speak plainly, they complained of the unconventional ways of the employees, who could not speak Bulgarian, the little care the company took to please the travellers, the slow speed with which the trains moved, and even the unheard of pretension repeatedly manifested not to accept Bulgarian coin. From the Bulgarian Minister of Finance himself we have been able to gather a number of not lesser grievances: the poor condition of the railways, the notorious insufficiency of artistic buildings, the insufficient power of the locomotives, often incapable of climbing the steep hillsides of the Balkans. The storehouse at Moustapha-Pacha centralized the locomotives and railroad cars on Turkish territory, abandoning Bulgarian stations and letting staple goods accumulate. The danger would even have been greater in time of mobilization. The superstructures not being in condition to carry powerful machines, it became impossible for Bulgaria to transport her troops, and in particular her artillery and convoys. The economic servitude was developing a paralysis of the military power and became intolerable.

These conditions remained the same until within the most recent times; for, when the Turkish revolution broke out, a strike among the employees of the Eastern Railway Company was declared; and communication was completely interrupted. It was reported in Bulgaria that the strike had taken place by order, and that the strikers had received word to that effect from Constantinople. Since this happened about the time of the proclamation of independence, it seemed as if the Turkish Government desired the continuation of the strike which handicapped the Bulgarian Government greatly in the execution of its mobilization. But it was soon learned at Sofia that on the Turkish side of the system work had been resumed in part and that ammunition cars had reached the frontier. The Bulgarian Government, requested to do so by the company, caused the line to be occupied by the troops and replaced the personnel with the

officers of the engineer corps of the army (9/22 September, 1908). Shortly afterwards, when the strike had come to a sudden end, the company demanded that the operation of the road be put again into its hands; but this request was met with summary refusal. In possession of the railways, the Bulgarian Government meant this time to remain in possession of them. It offered, to be sure, to come to an agreement as to an indemnity, but the company evaded acceptance of this proposition, and preferred to take the matter to Vienna and to Constantinople. The cabinet and the king having in the meanwhile proclaimed the country's independence, the railway question became only one of the features of a still greater difficulty.

It can not be denied that the government had in this matter dealt a real stroke of might which can be justified only by reasons of state. The Bulgarian ministry has ever since tried to make it appear as a measure of expropriation for the public good. This viewpoint might be sustained if one merely affirmed that the public utility of the measure was abundantly demonstrated. It is none the less true that the proffered indemnity lacked one of the essential qualities of expropriation indemnities: it may have been just, but it was not necessary. Besides, it did not constitute expropriation, but withdrawal of a concession; and we can not speak of expropriation when property is not involved. In the course of the long series of contentions engendered by this seizure, an attempt was made to make it appear that Turkey was the proprietor, and the company the tenant; but this was not so. The state is not the proprietor of the public domain; it exercises only the right of guardian or of superintendent whose one particular authority is the right to grant licenses of exploitation, and also to cancel such licenses if public utility demands it. Bulgaria could not have justified her acts except by proving that the eminent right of Turkey had passed into her hands at the time of the Rumelian revolution. To show this it would have been necessary to prove that at the time the transfer of sovereignty, that is to say, annexation had taken place; and this assumption Bulgaria has been unable to uphold in law. She has contended that the declaration of independence accomplished this transfer of sovereignty,

a contention which is inadmissible at a time when this unilateral act which, having nowhere been recognized, must be considered as not having taken place.

Nevertheless, the manner in which Turkey had exercised her right of concession being open to criticism, it became necessary to discuss the subject of a double indemnity, which Bulgaria acknowledged was due the Ottoman Government as grantor and the dispossessed company as grantee.

The first question to arise concerned the date of expiration of the concession. In a contract dealing with a concession, what is generally most important is the exact date when the concession is to begin and to end. But here it was different, since the concession which was granted the Eastern Railway Company was a singular one, a concession rewritten at five different periods, whose point of departure, hence whose duration, could be discussed.

In the first place, an original company, directed by Baron Hirsch, had obtained from the Porte, in 1869, a lease for ninety-nine years for the construction and operation of the railways, and had entered into a contract with the Austrian "Südbahn" for their operation. The proposition made by the building company not being accepted by the "Südbahn," Baron Hirsch formed the same year a separate operating company which should pay to the building company a rental, guaranteed by the Turkish Government, of 8,000 francs per kilometer railway. The building had but just begun when Baron Hirsch succeeded in modifying the agreement: the construction of the system contemplated was curtailed by cutting out all branch roads; and to the operating company he proposed a sharing of the profits to which the Turkish Government would not be a party *until the day when all the lines should be completed, and fixing the date of the expiration of the lease at fifty years after said completion.* But such became the course of political events that followed that the construction of the system never came to an end, thus leaving the date of the expiration of the lease undecided, and the clause regarding the division of the profits inefficacious. In 1880 the company was re-organized and its headquarters transferred to Zürich. And a little

time afterward, when Turkey was in need of money, the company made a loan to Turkey of twenty-three million francs at 7 per cent., on condition of a new division, final this time, of the profits.

This new arrangement of December 10, 1885, still refers to a lease for fifty years, but entirely omits to state the date of its beginning.

Afraid that it would incur the hostility of the Bulgarian Government, the company in this contingency improved its opportunity when the Porte was again in need of money, and by a new agreement in 1893, approved by the *Iradé* of February 15, 1894, raised the previous loan of twenty-three million to forty million francs, in consequence of which it was stipulated that the railway system should now be considered as completed, and that the term of the lease should run for fifty years, beginning January 1, 1908. In reality we are here dealing not with a lease of fifty years, but with one of eighty-four years duration, if we bear in mind the year 1874 when all construction work ceased; but of seventy-eight years duration if we go back to 1880 which is the year when "The Company for the operating of Eastern Railways," was formed. Anyhow, in spite of the period of fifty years originally fixed for the lease, it can not be doubted that the Turkish Government is legally bound until 1958, since it has stipulated so expressly.

But while the Bulgarian Government acknowledges that it must indemnify the company for having been dispossessed, can it be said that it must accept the term of this lease? Has the Rumelian branch of the system at any time escaped control by the Government at Constantinople? This has been maintained in Bulgaria where the conventions of 1872-1874 and the convention of 1880 alone are held to oppose the Government of the Principality, that is to say, Bulgaria declares that the term of the lease covers a period of either sixteen or twenty-four years.

To sustain this view, it has been said that since 1879, the Sultan no longer had the power by himself to grant exploitation rights. This, in our judgment, is an error.

Article XXI of the Treaty of Berlin declares that the rights and obligations of the Sublime Porte regarding this particular railway

are maintained. *Acquired* rights only, say the adversaries of the lease; but neither the faculty to modify them, nor that of creating new ones. In approving the creation of this province, this new moral factor, to which the Sultan had transferred, or with which he had at least shared his administrative powers, was to consult the Provincial Assembly and the government. This broad interpretation of the Treaty of Berlin does not seem exact to us. We believe, on the contrary, that whereas Rumelia remained a province and an integral part of the Turkish Empire, individually it possessed only such rights as had been distinctly conferred upon it; and in order to know what are these rights and powers, we must consult the Organic Statute. Article 13 of this Statute reads as follows:

The legislative power of the province exercises exclusive competence over: * * * the laws governing the public highways and *the granting of leases, the construction and operating of the provincial railways*, as well as all laws regarding public works *that are not executed at the expense of the Empire*.

Now, it is quite evident that the Eastern Railways are not railways of *provincial interest*, and also that public works have been built in part at least, at the expense of the Empire. Besides, Article 19 is still more explicit:

The customs, the posts and telegraphs, the lighthouses *and the railways of interest to the system of communication of the different provinces of the Empire among themselves and of the Empire with Europe*, as well as the manufacture and sale of army weapons and of gun powder *are reserved to the Empire*. * * *

The article concludes by stating that the governor-general shall not interfere in these administrations except to expedite the service and insure the discipline. "Railways of interest to the system of communication of the different provinces of the Empire among themselves and of the Empire with Europe," what paraphrase could better designate the great Paris-Constantinople railway, traversing Macedonia, Rumelia, the Adrianople and Constantinople vilayets?

Thus, in virtue of the Organic Statute, neither the legislative nor the executive power of the Province have the right to intervene in

contracts effected by the Ottoman Government with the Eastern Railway Company. Under the power of the Treaty of Berlin, any extension of lease granted by the Porte seems to us, therefore, above all objections. But we have still to consider whether or not the situation has changed since 1885, in consequence of the act of Top-Hané. We are inclined to believe that the situation has changed, since we have affirmed that in virtue of this act and of the subsequent extension given to it, the Porte retained in Rumelia the mere right of suzerainty only, which does not, from whatever angle we may examine it, include concessionary power. In accordance with and only in accordance with the terms of annexation, Bulgaria might, therefore, have considered the convention of 1893 as not having taken place. But, granting that her government, for the sake of diplomatic ceremony, admitted that the juridical situation of Rumelia had not been modified by the union, and granting besides that the Top-Hané act may be interpreted as maintaining the material and pecuniary advantages assured to the Sultan by the Treaty of Berlin, the Bulgarian Government must admit the date of 1958 as the date of the expiration of the lease, as in fact the Minister of Finance did admit in his report to the Sobranjé, and indemnify the company for depriving it of the enjoyment of its right extending over a period of fifty years, which would according to the computation of M. Bousquet amount to about forty-four million francs. In virtue of the contract of 1880, the Turkish Government was to have received forty-five per cent. of this sum.

This sum represents the *lucrum cessans*. The company claimed besides an indemnity because of the *damnum emergens* which the cancellation of its lease would bring to it. Several of its pretensions in this respect seemed to be rather ill-founded,¹⁶ but it is certain that the per kilometer profit of a railway system increases according to the extent of it, and that it is customary in expropriation cases or in the case of lease cancellation to take account of all the profits that can be proven directly. Under this claim, M. Bousquet estimates

¹⁶ The Bulgarian Government was never inclined to admit that it was in any way indebted to the company under this claim.

that there might be due the company, about 3 and one-half million francs covering a period of fifty years. The total indemnity due the company might in this way amount to nearly forty-eight million francs.

Are there other rights that the Porte can enforce against the Bulgarian Government? The loss of power to grant privileges, resulting from the transfer of sovereignty could not possibly give rise to a claim for indemnity. Unless there is an agreement to the contrary, whenever dismemberment goes on, the public domain of the severed state passes *ipso facto* to the annexing state, which is not bound to reimburse the original state for expenses incurred in administering and improving that domain. This is so regarding the highways; why should it be otherwise regarding the railways. Still, considering the Turkish Government as the proprietor of the railway line, the Bulgarian Government has acknowledged itself obliged to indemnify it. This is a settlement of a purely political convenience, and need not be examined juridically.

With this understanding, a lump sum of forty million francs has been stipulated in the Turko-Russian and Turko-Bulgarian protocols for the object of indemnifying at the same time the Ottoman Treasury and the Eastern Railway Company. In consequence of a subsequent agreement entered into in September, 1909, between the Porte and the company, the latter is to receive a lump sum of nineteen million francs. It is to receive from the Bulgarian Government an additional indemnity which Article 7 of the protocol of Constantinople declares in the following terms:

Bulgaria's immediate debts to the Eastern Railway Company, resulting from the confiscation of operating stock and material seized, etc., * * * together with the operating indemnity beginning Sept. 9/22, 1908, for the railway lines occupied until the time of the adjustment of the portion due said company of the 40 million francs specified in Article 3 of the St. Petersburg protocol, shall be mutually agreed upon between the Bulgarian Government and the company.

There is no need of commenting upon this article: the Bulgarian Government acknowledges itself as directly indebted to the company

for railway receipts collected and for material losses sustained by the company, resulting from dispossession, from the date of said dispossession to the time of the Turko-Bulgarian protocol.¹⁷

GEORGES SCELLE.

¹⁷ Under the terms of this article, a detailed accounting system has been kept by the two parties, and in consequence of laborious negotiations an agreement was reached, signed and presented to the Sabranjé. It bears date of June 13/26, 1909, and is signed by Mr. Liapscheff, Secretary of Commerce, and by Mr. Ulrich Gross, director of the Eastern Railway Operating Company.

[TO BE CONTINUED.]

RETALIATION IN WAR *

We presume that many of our readers have noticed the recent debate in the Congress of the United States on the subject of retaliation upon rebel prisoners of war in our hands for the treatment ours have received from the rebel authorities; and we think not a few must have been surprised at the course of that discussion. That opinions on this subject should differ is very natural; but so very wide a difference, or rather a direct conflict of opinion, on fundamental principles, would suggest that either the law itself was unsettled, or that the speakers did not well understand it. Indeed, on these questions of the laws and usages of war there is great want of information, not only among our people generally, but among our legislators, courts, lawyers, military officers and other public men. Nor is this to be wondered at. Prior to the present war, the people of the United States made no claim to be a *military* people; on the contrary they prided themselves as being *civil* in the strict sense of that word, and disclaimed and discountenanced all knowledge of the military art, or acquaintance with the science of war. Indeed, a profound peace of more than three-quarters of a century could scarcely be said to be interrupted by the insignificant contest of 1812,

* The foregoing paper, like those which have preceded it, was found among the papers of Major-General Halleck at his death, which occurred at Louisville, Kentucky, on January 9, 1872. The article is in the General's handwriting and was prepared, probably during the year 1864, when the question of the treatment of prisoners of war was undergoing serious discussion, not only in Congress but in the public press. The paper has considerable value as expressing the views of one of the ablest international lawyers of his time in respect to the extent of the power of a government to resort to acts of retaliation in time of public war with a view to coerce the enemy into obedience to the accepted rules and usages of war. — G. B. DAVIS.

It should be remembered that General Halleck's Article was written during the Civil War. If the life of the learned author had been prolonged and had the article been written at the present day, the language would, no doubt, have been more measured and restrained. — EDITOR-IN-CHIEF.

or the short war with the weak and demoralized Republic of Mexico. During this long period our pursuits as a nation have been, not of arms, but of agriculture, manufactures and commerce. Moreover, our very astute politicians and legislators have assured us, time and again, that there was no necessity for any military organization or military knowledge in the United States, for our untrained militia were more than sufficient for any contingency that could possibly arise. It is true that Washington and his contemporaries who achieved our independence and founded the Republic took a different view of this question; but who would presume to compare their opinions with those of the sages who lead our modern Congressional debates!

Before entering upon a general discussion of this subject, it may be well to refer, in regard to definitions and principles, to professional writers on the laws of war.

In the *Instructions for the Government of the Armies of the United States in the Field*, prepared by Dr. Lieber and General Hitchcock, it is said:

The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.

Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution.

Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages.

Professor Woolsey in his *Elements of International Law*, says:

If one belligerent treats prisoners of war harshly, the other may do the same; or if one squeezes the expenses of the war out of an invaded territory, the other may follow in his steps. It thus becomes a measure of self-protection, and secures the greatest amount of humanity from unfeeling military officers. But there is a limit to the rule. If one general kills in cold blood some hundreds of prisoners who embarrass his motions,

his antagonist may not be justified in staining himself by similar crime, nor may he break his word or oath because the other had done so before.

General Halleck in his work on *International Law and Laws of War*, in speaking of the rule of reciprocity, says:

If the enemy refuses to shape his conduct by the milder usages of war, and adopts the extreme and rigorous principles of former ages, we may do the same; but if he exceeds these extreme rights, and becomes barbarous and cruel in his conduct, we cannot, as a general thing, follow and retort upon his subjects, by treating them in like manner. We cannot go beyond the limits prescribed by international law to the rights of belligerents.

And after giving several examples of justifiable retaliation, adds:

But suppose an enemy should massacre all prisoners of war, this would not afford a sufficient justification for the opposing belligerent to do the same. Suppose our enemy should use poisoned weapons, or poison springs and food, the rule of reciprocity would not justify us in resorting to the same means of retaliation. A savage enemy might kill alike old men, women and children, but no civilized power would resort to similar measures of cruelty and barbarism, under the plea that they were justified by the law of retaliation.

In February, 1862, Major General Curtis reported that forty-two of our officers and men of one regiment had been poisoned by eating provisions at Mud Town in Arkansas, which the retreating rebels had poisoned and left behind, whereupon the commanding general of the Department issued a general order from which we make the following extract:

We cannot retaliate by adopting the same barbarous mode of warfare, nor can we retaliate by punishing the innocent for the acts of the guilty. The laws of war forbid this. But the same code authorizes us to retaliate upon the guilty parties. Any persons guilty of such acts, when captured, will not be treated as ordinary prisoners of war; they will not be shot, but will suffer the ignominious punishment of being hung as felons. Moreover, all officers are in a measure responsible for the acts of the troops under their command. Officers of troops guilty of such acts, although not themselves the advisers or abettors of crime, will therefore, when captured, be put in irons, and conveyed as criminals to these headquarters. The laws of war make it their duty to prevent such barbarities; if they neglect that duty they must suffer the consequences.

These authorities are fully sustained by older writers on the laws and usages of war. From them we draw the following conclusions:

1. That retaliation is a well settled principle of the modern law of war, and is resorted to by the most civilized and Christian people.

2. It must not be applied in a spirit of revenge nor, unnecessarily as a punishment; the object of its use being to prevent a repetition of the offence or crime which is retaliated on the enemy.

3. Retaliation may be, as the word indicates, literally in kind, that is, "an eye for an eye and a tooth for a tooth," or in a more general sense, other countervailing measures being adopted by way of retaliation.

4. The law of retaliation in war has its limits, as well as criminal law in time of peace, the object of both being, not revenge, but prevention; not primarily the punishment of the individual offender, but to deter others from a like crime.

5. As in time of peace we generally punish only the guilty party, so in time of war we generally retaliate only on the individual offender. But there are exceptions in both cases. Thus, all the members of a town or corporation are held responsible in damages for the neglect or carelessness of their agents; so, in war, a city, an army, or an entire community, is sometimes punished for the illegal acts of its rulers or individual members.

6. Retaliation is limited in extent by the same rule which limits punishment in all civilized governments and among all Christian people — *it must never degenerate into savage or barbarous cruelty.*

To illustrate and discuss the foregoing rules, we will now apply them to the question of retaliation for the treatment of our prisoners of war by the rebel authorities. In regard to this treatment we think that documentary evidence recently laid before Congress, fully sustains the statement of the official report of the General-in-chief submitted to Congress in 1863, viz.:

* * * Our soldiers, who, by the casualties of war, have been captured by them, have been stripped of their blankets, clothing, and shoes, even in the winter season, and then confined in damp and loathsome prisons, and only half fed on damaged provisions, or actually starved to death; while hundreds have terminated their existence, loaded with irons, in filthy prisons; not a few, after a semblance of trial by some military tribunal, have been actually murdered by their inhuman keepers. In fine, the treatment of our prisoners of war by the rebel authorities has

been even more barbarous than that which Christian captives formerly suffered from the pirates of Tripoli, Tunis, and Algiers; and the horrors of "Belle Isle" and "Libby Prison" exceed even those of "British hulks" or the "Black Hole of Calcutta." And this atrocious conduct is applauded by the people and commended by the public press of Richmond as "a means of reducing the Yankee ranks."

Admitting this to be a true statement of the treatment received by our prisoners of war, the question arises, may we retaliate, and if so, on whom, and to what extent?

We think there can be no doubt that this is a fair case for retaliation, and that it would justify us in carrying it to the extreme limit authorized by the laws and usages of war. But upon whom are we to apply it, and what is the extreme limit beyond which it can not be carried? These are important questions, but by no means new.

In the first place, we may retaliate upon the authors of this barbarous and cruel treatment and upon all the officers, agents and soldiers who have engaged in it, as *particeps criminis*. We have not been and may not be able to reach the rebel leaders who are the principal authors of these crimes; but whenever any officers or other persons who have been engaged in this atrocious conduct against our soldiers are captured, we hold it to be the bounden duty of the executive to see that these individuals are duly punished. In such cases there should be no ill-timed leniency, no soft-hearted clemency, no weak-hearted swerving from the stern duty of inflicting just punishment, even though the culprit should be the magistrate's own son. Leniency to an enemy in such a case is but another name for cruelty to our own soldiers.

But if the actual authors and agents of this cruelty to our soldiers can not be reached, may we retaliate upon individuals who have not been active participants in such cruelty? We answer, undoubtedly yes. This is a case where the entire community becomes responsible for the acts of its rulers, and each individual member is subject to the law of retaliation. Moreover, this case does not rest on a mere abstract principle or rule of right. The community not only acquiesced, but urged their rulers and agents on to the commission of these atrocities. The entire rebel press advocated and justified

them, and even the rebel women have so far forgotten their sex and their mission of mercy on earth, as to approve and encourage acts of cruelty which it was supposed could be committed only by a savage people and in the most barbarous ages. And for these acts we say unquestionably their husbands and brothers and sons are both legally and morally responsible, and may be retaliated on. But what shall be the nature and extent of such retaliation?

As already remarked, retaliation need not, and in many cases ought not to be in kind. Vattel very justly says: "What right have you to cut off the nose and ears of the ambassador of a barbarian who has treated your ambassador in that manner?" And again: "The Senate, and even Tiberius himself, thought it unlawful to adopt the use of poison, even against a perfidious enemy, as a kind of retaliation or reprisal." The kind of retaliation must therefore depend upon the nature of the offence and the criminality of the individual offender. The correct rule is given in the general order, already referred to, in the case of the supposed Arkansas poisoning. We could not poison rebel soldiers in retaliation, but we could punish with imprisonment, chains and even death, the actual perpetrators of the atrocity and the officers who either connived at it or neglected to prevent it. And so of the rebel authorities who ordered, and of their officers and agents who executed this system of cruelty; we can not starve nor freeze, nor roast them; but we may condemn and execute or otherwise less severely punish them, for the offences which they have committed against the laws of war. And if we are unable to punish the individual offenders we may, by the more severe and extreme usages of war, retaliate in kind upon any rebel soldiers that fall into our hands, *provided* that by such retaliation we may reasonably expect to mitigate the sufferings of our own men. We can not do this in mere revenge; nor can we carry it to the savage cruelty of actual starvation. On this subject we give an extract from a letter of Dr. Lieber, published in *The Daily Globe* (Washington) of January 25, 1865:

* * * I am not opposed to retaliation because it strikes those who are not or may not be guilty of the outrage we wish to put an end to. That is the terrible character of almost all retaliation in war. I abhor

this revenge on prisoners of war because we would sink thereby to the level of the enemy's shame and dishonor. All retaliation has some limit. If we fight with Indians who slowly roast their prisoners, we cannot roast in turn the Indians whom we may capture. And what is more, I defy Congress or Government to make the Northern people treat captured Southerners as our sons are treated by them. God be thanked you could not do it, and if you could, how it would brutalize our own people! I feel the cruelty as keenly as any one; I grieve most bitterly that people whom we and all the world have taken to possess the common attributes of humanity, and who after all are our kin, have sunk so loathsomely low; * * *

* * * Those who can allow such crimes would not be moved by cruelties inflicted upon their soldiers in our hands. These cruelties, therefore, would be simply revenge, not retaliation, for retaliation as an element of the law of war, and of nations in general, implies the idea of thereby stopping a certain evil. But no mortal shall indulge in revenge.

I am indeed against all dainty treatment of the prisoners in our hands, but for the love of our country and the great destiny of our people, do not sink, even in single cases, to the level of our unhappy, shameless enemy. * * *

If you could march out some ten thousand prisoners in our hands and say to the enemy: Either you treat our prisoners better or we execute every one of these ten thousand prisoners in our hands, and if you could make the enemy believe you, I would say this is plain retaliation. But could you do it; would you do it? And as to starve those who have starved our sons, and by the thousand, why every one knows the thing cannot be done, and heaven be praised it is so.

While fully concurring with this distinguished juriconsult, that we can not retaliate upon the rebel prisoners of war to the barbarous extent of starving, freezing, or roasting them, we think, nevertheless, that the sufferings of our prisoners justify and require retaliation, and retaliation in kind, so far as is permissible by the laws of war. The rebel authorities say that they are unable to furnish their soldiers or our prisoners with the same ration that we do, but have a bill of fare which they pretend to supply to prisoners, poor and scanty it is true, but sufficient to support life and to prevent any serious sufferings from hunger. Let us give the same fare to their officers and men in our hands. No one can complain of this. But the rebels do not follow their pretended bill of fare; on the contrary, we know that they have often reduced it in quantity or quality so as to cause starvation and death. We, as a civilized and Christian

people, can not do this. Again they give our prisoners no clothing and frequently strip them of what they have so that they die from exposure to the weather. Under such circumstances we are under no obligations to clothe their officers and men who are prisoners in our hands; but we have no right to take their lives by barbarous exposure to the cold. And again, thousands of our men have been compelled to labor in their work-shops in order to earn a scanty supply of food. Here again we can retaliate in kind. Let us make their officers and soldiers work for their food. Such retaliation is justifiable by the usages of civilized warfare. Again, we may demand of the enemy that such of his officers and agents as are clearly proven to have killed, starved or maltreated our prisoners shall be duly punished, and if he refuse this, we may select a corresponding number of his officers in our hands, and place them in irons or cells and feed them on bread and water only, till he will abate the evil.

We suggest these modes simply to show that we can retaliate upon the enemy for his treatment of our prisoners, without violating the laws and usages of war. Probably other means, more effective but still legitimate, might be resorted to; and if so, we think it the duty of the executive to order them. If our enemies make themselves savages and brutes, we can not imitate them; but we can and ought to employ every legitimate means of punishing their violations of the laws of war and the rights and duties of humanity.

By the common consent of all modern writers on international law, prisoners of war are forbidden to be treated with undue severity. If they are not exchanged and no arrangement is made for their support by their own government, the captor must supply them with the necessary food, clothing and shelter. They can be punished only for actual offences against the laws of war; but not for being enemies. The rebels have violated all these well-established and well-known rules. We have the right, the means, and the opportunity to punish them for their inhumanity, and it is our duty to do so. We owe this, not only to our own suffering soldiers, but to humanity, to history, and to the world. Let us show to all that we will enforce the laws of war, by vindicating the right, and sternly punishing the wrongdoer. It is true that too much severity in punishing crime

often ends in needless cruelty; and it is equally true that too much leniency in enforcing the law often leads to the commission of crime. The rigorous enforcement of law, in war as well as peace, tends to cause its proper observance.

But there are other matters besides the treatment of our prisoners of war for which we have just cause for retaliation on the rebels.

All remember the horrors of the massacre of Fort Pillow, and the barbarous treatment of our soldiers and Union men in Tennessee, Kentucky, Alabama and Georgia. These crimes still remain unpunished. But how are we to retaliate? We certainly can not raise the black flag and massacre an equal number of the enemy who may fall into our hands. But we can punish with death any one of the perpetrators of these fiendish acts who may be captured. Moreover, Forrest and Buford and any of his officers who favored or permitted these acts of their followers, are subject to the same penalty. An officer is responsible for the conduct of his command and is himself *prima facie* guilty of the crimes they commit. It rests upon him to prove his innocence. Upon the same principle the rebel authorities, and through them their whole army, are responsible for these acts, unless they take the proper measures to punish the perpetrators. Our government should demand that this be done, and if refused we would be justified in placing in irons a corresponding number of prisoners of war and treating them with the utmost rigor authorized by the laws of war.

But it may be said that our officers and soldiers have sometimes been guilty of like, if not equal atrocities; and that some of our high officers have been applauded by the newspaper press for tyranny and cruelty towards rebels who have fallen into their hands. In regard to the first proposition, we remark that individual instances of cruelty and crime occur in all wars, which no authority can entirely prevent; and to the latter, that newspapers, when manipulated by party politicians, sometimes attempt to make great men and heroes out of very poor and very bad materials. Such bubbles, however, are usually burst by the inflation.

The proper question for consideration is, whether our government has ever encouraged such cruelties, and whether it has taken the

proper measures to punish the guilty parties. Whatever may be said in regard to any particular individual, or any isolated case, it must be admitted by all that our officials generally have exerted themselves most strenuously to prevent and punish all military crimes, whether committed against our own people or against rebels. We can hardly take up a newspaper without seeing a notice or record of trials or dismissals for such offences. But who has ever seen such notices in the rebel newspapers? Even the atrocities of Fort Pillow were almost universally approved by the rebel press, and the perpetrators were feted and applauded throughout the rebel States. In this respect the conduct of the two belligerents presents the strongest possible contrast — the one being governed by the most lenient rules of civilized warfare, while the course of the other has been marked by barbarous cruelty, and an almost savage thirst for blood. And this course of the rebels is proved not only by the practices of their soldiers, but by the orders of their generals, the tone of their press, the official despatches of their rulers, the private letters of their citizens, and especially the conduct of their women; for we know of no modern war in which the female character has been so debased and so destitute of all the softer attributes which ought to adorn the sex.

There are some who think that the character of the rebels has become so debased by this course of warfare that retaliation against them will have very little effect. And we might almost infer from the quotation made from Dr. Lieber, that even his cool and practical mind had arrived at the same conclusion. There can be no doubt that civil wars and unjustifiable rebellions and insurrections greatly debase the human character.

Shakespeare says:

Worthy to be a *rebel*, for to that
The multiplying villainies of nature
Do swarm upon him.

Nevertheless, we are of opinion that even *our rebels*, however much "the multiplying villainies of nature do swarm upon them," may be made amenable at the bar of international justice, and that retaliation will produce its effect even upon the Richmond cabal. And we

think this has already been proven, as will appear by the following examples:

Two rebel officers were tried, condemned and executed, in the Department of the Ohio, for violations of the laws of war to which the penalty of death was attached. The rebel authorities pretended that these proceedings were illegal and unauthorized, and, seizing Captains Flinn and Sawyer for the expiatory sacrifice, they condemned them to be executed by way of, what they called, retaliation. The President promptly ordered General Lee's son and another rebel officer, prisoners of war, to be placed in close confinement, with directions to hang them the moment authentic information was received that Flinn and Sawyer were hung. This brought the rebels to their senses. Captains Flinn and Sawyer were exchanged — not hung.

Again the rebel authorities directed that no officer of colored troops should be exchanged as a prisoner of war, but that all should be turned over to State authorities to be tried and punished under State laws on the charge of inciting, by their commissions as officers of colored troops, servile insurrections. The President ordered that an equal number of Confederate officers from the States in which ours were captured should be placed in close confinement and be treated precisely as our officers were treated. This ended the rebel braggadocio so far as colored troops are concerned.

Indeed, after violating all rules of civilized warfare by giving no quarter to our colored troops, merely because they were colored, and murdering and shamefully treating the officers who commanded them, the rebel authorities have organized colored troops of their own, thus acknowledging before the world the illegality as well as inhumanity of their former course.

We remark, in conclusion, that in order to make retaliation effective, it should be directed, as far as possible, against rebel officers rather than against their private soldiers. It is well known that the rank and file of the rebel armies are mostly composed of the poorer and ignorant classes — what the negroes call "the poor white trash" — of the Southern States, while their officers are almost exclusively aristocratic planters and slave owners. They have very little sympathy with their soldiers and care very little about the

treatment they may receive. But they are peculiarly sensitive when retaliation is applied to their own class. This was shown in the case of General Lee's son, who was confined as one of the hostages for Captains Flinn and Sawyer. We should keep these facts in mind in adopting any future measures of retaliation against the rebels.

Since the foregoing was written a large number of suffering prisoners have been exchanged; but as others are still treated with the same cruelty, the principle of retaliation is applicable to them as well as other cases of violation of the laws of war.

HENRY WAGER HALLECK.

THE HISTORY OF THE DEPARTMENT OF STATE

IX

DUTIES OF THE DEPARTMENT OF STATE

III

The highest duty of an American diplomatic or consular officer is to protect citizens of the United States in lawful pursuit of their affairs in foreign countries. The document issued in authentication of the right to such protection is the passport.*

Broadly speaking, the Department issues two kinds of passports — those for citizens and those for persons who are not citizens. Citizens' passports are ordinary and special; aliens' passports are for travel in the United States and for qualified protection abroad of those who have taken the first steps to become American citizens.

The citizen's passport is the only document issued by the Department of State to authenticate the citizenship of an American going abroad. The Act of August 18, 1856,¹ makes the issuance to one who is not a citizen a penal offense if it is committed by a consular officer.² Before this law was passed the Department did not issue the document to aliens; but it was permitted to this government's agents abroad sometimes to issue it to others than American citizens. The *Personal Instructions to the Diplomatic Agents of the United States* of 1853 said:

They sometimes receive applications for such passports from citizens of other countries; but these are not regularly valid, and should be granted only under special circumstances, as may sometimes occur in the case of foreigners coming to the United States.

* See *The American Passport, its History and a Digest of Laws, Rulings and Regulations governing its issuance by the Department of State*, 1898.

¹ 11 Stat. 60.

² R. S. U. S. 4078.

In July, 1845, the Department printed a notice "for the information of citizens of the United States about to visit foreign countries," which said:

To prevent delay in obtaining a passport, the application should be accompanied by such evidence as may show the applicant to be a citizen of the United States (when that fact is not already known to the Department of State).

The first passport found in the files of the Department is dated July 8, 1796, and is on a printed form showing that it was in common use:

To all to whom these presents shall come, Greeting:

The Bearer hereof, Francis Maria Barrere a citizen of the United States of America, having occasion to pass into foreign countries about his lawful affairs, these are to pray all whom it may concern, to permit the said Francis Maria Barrere (he demeaning himself well and peaceably) to pass wheresoever his lawful pursuits may call him, freely and without let or molestation in going, staying or returning, and to give him all friendly aid and protection, as these United States would do to their citizens in the like case.

In faith whereof I have caused the seal of the Department of State for the said United States to be hereunto affixed.

Done at Philadelphia, this eighth day of July in the year of our Lord 1796, and of the Independence of these states the twenty-first.

TIMOTHY PICKERING,

Secretary of State.

(Gratis)

Undoubtedly such a passport as the above was issued by the Secretary of State from the beginning of the government under the Constitution, as it had been by the Continental Congress and the Governors or Presidents of the States under the old government. In fact, the practice of State authorities issuing passports maintained until it was made unlawful for any one but the Secretary of State to issue a passport in the United States by the Act of August 18, 1856. Much imposition and fraud were practiced by persons not citizens in obtaining American passports. The condition of affairs in 1835 was thus described by the Supreme Court:

There is no law of the United States in any manner regulating the issuing of passports, or directing upon what evidence it may done, or declaring their legal effect. It is understood, as a matter of practice, that

some evidence of citizenship is required by the Secretary of State before issuing a passport. This, however, is entirely discretionary with him.

The evidence required before issuance consisted chiefly of letters from the applicants themselves or from third persons known to the Department, or certificates from notaries public that the applicants were citizens of the United States. The Department's circular of 1845 produced an improvement in the character of the applications for passports and they were often in the form of affidavits. A circular issued in 1846 required that the application be in the form of an affidavit and that it be accompanied by the certificate of naturalization if the applicant was of alien birth.

The twenty-third section of the Act of August 18, 1856, making it a penal offense for anybody in the United States except the Secretary of State to issue passports or documents in the nature of passports, a circular of instructions stating this fact was issued by the Department in August, 1857. The requirements of applicants became more and more detailed by successive circulars, until on September 15, 1896, they were changed by Secretary Olney from *General Instructions to Rules Governing Applications for Passports*.

The Act of August 18, 1856, had, however, required that passports should be issued "under such rules as the President" should prescribe. The rules had never been prescribed by the President, until Secretary William R. Day sent the following letter to the President:

DEPARTMENT OF STATE,

WASHINGTON, May 21, 1898.

To the President:

I have the honor to submit for your approval certain Rules Governing the Granting and Issuing of Passports in the United States. That they should be prescribed by the President appears, in the opinion of this Department, to be rendered necessary by the terms of the Act of Congress approved August 18, 1856 (11 Stat. 60 Rev. Stats. Sec. 4075), as follows:

"The Secretary of State may grant and issue passports, and cause passports to be granted, issued and verified in foreign countries by such diplomatic or consular officers of the United States, and under such rules as the President shall designate and prescribe for and on behalf of the United States; and no other person shall grant, issue, or verify any such passport."

Respectfully submitted,

WILLIAM R. DAY.

The form of passport issued in the beginning had undergone a change by 1817, when it was made to include a description of the person to whom it was issued, and thereafter slight modifications were made. At present it is as follows:

Good only for
two years from date.

[SEAL]

UNITED STATES OF AMERICA.

DEPARTMENT OF STATE,

To all to whom these presents shall come, Greeting:

I, the undersigned, Secretary of State of the United States of America, hereby request all whom it may concern

Description,
Age, 43 Years.
Stature, 5 Feet, 3½ Inches Eng.
Forehead, fair.
Eyes, grey.
Nose, small.
Mouth, small.
Chin, round.
Hair, brown.
Complexion, fair.
Face, medium.

to permit *Mary L. Matthews*,
a Citizen of the United States
safely and freely to pass, and in
case of need to give her all lawful
Aid and Protection.

[SEAL]

Given under my hand and the
Seal of the Department of State,
at the City of Washington,
the 14th day of April in the
year 1908, and of the Independ-
ence of the United States the
one hundred and thirty-second.

Signature of the Bearer.

Mary L. Matthews.

Elihu Root.

No. 49760.

The special passport is also a citizen's passport, but it differs in form from the ordinary passport, in that it usually describes the official rank or occupation of the person to whom it is issued and does not describe his person. He is not required to make formal application for it nor to produce proof of his citizenship, it being presumed that the Department is already informed on this point. The earliest record of a special passport is in 1819; but it is probable that they were issued from the beginning of the government. The form has varied widely; but the request for the protection of the holder has been the same as in the ordinary passport. Following is the form at the present time:

[SEAL]

No. 48799.

(Special Passport.)

UNITED STATES OF AMERICA,

DEPARTMENT OF STATE.

To all to whom these presents shall come, Greeting:

Know Ye, that the bearer hereof,

Charles Ray Dean,

a citizen of the United States, Special Disbursing Officer of the Commission of the United States to the International Exposition at Turin, is about to proceed abroad, accompanied by his wife.

These are therefore to request all whom it may concern to permit *him* to pass freely without let or molestation, and to extend to *him* all such friendly aid and protection, as would be extended to like *Officers* of Foreign Governments resorting to the United States.

IN TESTIMONY WHEREOF, I, *P. C. Knox*, Secretary of State of the United States of America, have hereunto set my hand and caused the Seal of the Department of State to be affixed at Washington this 25th day of April A. D. 1911 and of the Independence of the United States of America, the 135th.

[SEAL]

The Act of March 23, 1888,³ requires the Secretary of State to collect a fee of one dollar for every citizen's passport issued, and the same fee is required to be collected by American diplomatic and consular officers when they issue passports abroad. In the early days of the Department no fee was charged. The form of passport issued in 1796 had "Gratis" printed on it; the circulars of instruction of 1845, 1846 and 1857 stated that no fee was charged. The Act of July 1, 1862, "to provide internal revenue to support the Government and to pay interest on the public debt" prescribed a fee of three dollars for each passport issued at home or abroad. By Act of June 30, 1864,⁴ the amount was increased to five dollars. The fee was abolished by Act of July 14, 1870,⁵ restored to five dollars by

³ 25 Stat. 45.

⁴ 13 Stat. 276.

⁵ 16 Stat. 267.

Act of June 20, 1874,⁶ and remained at that amount until the law now in force was passed. The amount collected from the fees has never been large, but is sufficient to make the Bureau of Citizenship, which issues passports, self-sustaining.

It had not been the custom to collect the fee for special passports. The matter was supposed to be within the discretion of the Secretary of State; special passports differed in wording from ordinary passports; they were in a measure complimentary. But in 1894 the question was raised, whether, in view of the language of the law requiring the collection of the fee for "each citizen's passport issued," it was permissible to waive the fee in any case. No decision was reached at the time; but the following year it was ruled by Secretary Olney, verbally and informally, that if the special passport contained no statement of the American citizenship of the person to whom it was issued no fee need be collected. Of course, such a course made the document hardly a passport at all; and the whole question was brought up on review before Secretary Sherman in 1897. The Solicitor, Walter E. Faison, submitted an able memorandum in which he said:

The special passport is not, to my knowledge, granted to any official or individual who is not a citizen of the United States. * * * It is clear to my mind that the special passport is nothing but an ordinary passport, in which the bearer's title of office and dignity are substituted for the ordinary description of a man. It differs in no essential particular from the passport referred to in the statutes. It is a citizen's passport, and I recommend the restoration to the form of the declaration that the bearer is a citizen of the United States.

Under date of May 1, 1897, the Secretary decided that the special passport should contain a statement of the American citizenship of the person to whom it was issued and that the same fee must be collected for it as for the ordinary passport.

As the holder of a special passport is supposed to enjoy more attention from foreign officials than the holder of an ordinary passport, there was a great deal of importunity on the part of travelers

⁶ 18 Stat. 90.

to obtain them as long as the Department was not strict in limiting them to public officials proceeding abroad on official business. Personal acquaintances, not in the public service, of officers of the Department and officers of other Departments of inferior rank travelling for pleasure had only to ask in the proper quarter and receive special passports. Mr. Fish, during the eight years of his service as Secretary of State, issued only thirty-five special passports to private individuals, but Mr. Evarts, in four years, issued ninety-six, and Mr. Blaine, serving nine months, fifty. Mr. Frelinghuysen, serving three years, issued eighty-three; Mr. Bayard, in four years, one hundred and fifty-four; Mr. Blaine, in less than three years of his second incumbency, three hundred and ninety-four; Mr. Foster, in less than a year, twenty-nine; Mr. Gresham, in two years, one hundred and three; Mr. Olney, in less than two years, twenty-two. The rule adopted by Secretary Fish had been that no officer of the Army below the rank of Major should receive a special passport. This regulation had sunk into disuse and even military cadets received special passports; but in May, 1894, an informal communication to the Secretary of War caused him to cease from that time asking for any special passports for Army officers, unless they were ordered abroad on public business. In 1897 the question was reopened by a letter of Lieutenant-Colonel Clous to the War Department which was referred to the Secretary of State. The following reply was made:

* * * * *

On August 19, 1874, Mr. Fish, Secretary of State, in a letter to the Acting Secretary of the Treasury, laid down the following rule in respect to special passports: "It is the rule of the Department to issue special passports only to prominent officials about to visit foreign countries on public business. In the military service of the Government they are given to officers not below the rank of Major in the Army and the relative rank in the Navy." * * *

During the last Administration an effort was made to check the too free issue of these documents, and to revert, in so far as possible to the original intention in regard to them. * * *

The Department is now, however, in view of the representations made in Lieutenant-Colonel Clous's letter and your endorsement thereon, prepared to modify the informal notice of May, 1894, and will hereafter issue to officers of the Army special passports, depending upon your

Department to ascertain before making requisition for such passports that they will be put to uses tending to increase the efficiency of the military service and will not be used for purposes of purely private and personal convenience. They will be issued only upon request of your Department, and never upon direct request of Army Officers.

The rule, then, had become in some sort definitely established. Officers of the government of high rank, civil or military, going abroad on public business were to receive special passports; but the War Department requested them for military officers of all ranks going abroad on personal errands as well as officially. Again the question came before the Secretary of State and Mr. Root ordered that Mr. Fish's rule be reverted to, and that rule now maintains. Occasionally, however, the Secretary of State departs from it and furnishes a private citizen of great eminence with a special passport. The form of description is simply, "a distinguished citizen of the United States," or "one of the most distinguished citizens of the United States," or some similar phrase.

There is considerable variation in the number of citizen's passports issued. Each one is numbered, the number beginning with the administration of a new Secretary of State and ceasing with the termination of his office. Since June 28, 1810, they have been continuously recorded and the number issued by each Secretary is as follows:

Secretaries.	No. Passports.	Secretaries.	No. Passports.
Robert Smith.....	227	John M. Clayton.....	4,528
James Monroe	872	Daniel Webster	5,247
John Q. Adams.....	1,204	Edward Everett	891
Henry Clay	1,118	Wm. L. Marcy.....	12,429
Martin Van Buren.....	669	Lewis Cass	21,769
Ed. Livingston	694	J. S. Black.....	721
Louis McLane	328	Wm. H. Seward	40,683
John Forsyth	3,353	E. B. Washburne	118
Daniel Webster	1,316	Hamilton Fish	29,929
Hugh S. Legare.....	130	William M. Evarts.....	19,886
A. P. Upshur.....	401	James G. Blaine.....	3,931
John Nelson	7	F. T. Frelinghuysen.....	14,238
John C. Calhoun.....	981	Thomas F. Bayard.....	40,218
Jas. Buchanan	5,377	William F. Wharton.....	2,060

Secretaries.	No. Passports.	Secretaries.	No. Passports.
John W. Foster.....	4,243	Alvey A. Adee.....	280
William F. Wharton.....	175	John Hay.....	108,404
Walter Q. Gresham.....	25,013	Francis B. Loomis.....	1,066
Edward F. Uhl.....	906	Elihu Root.....	67,451
Richard Olney.....	20,400	Robert Bacon.....	1,573
John Sherman.....	14,600	P. C. Knox, March 5, 1909- July 7, 1911 (inclusive)...	57,113
William R. Day.....	5,182		

It will be seen from this table that the largest number of passports issued by one Secretary was issued by John Hay. This part of the Department's business generally increases, but is subject to fluctuations produced by unusual conditions. If conditions in Europe are unduly disturbed a greater proportion of Americans going abroad take out passports than is the case when foreign conditions are peaceful. If a foreign country which does not ordinarily require people entering it to have passports adopts a rule requiring passports the regulation necessarily affects the number of applications for passports. In years when the country is prosperous more people go abroad than in the years of depression.

The latest rules for issuance follow. Blank forms of application are provided by the Department embodying all the facts which the rules require to be set forth:

RULES GOVERNING THE GRANTING AND ISSUING OF PASSPORTS IN THE UNITED STATES.

1. BY WHOM ISSUED AND REFUSAL TO ISSUE. — No one but the Secretary of State may grant and issue passports in the United States (Revised Statutes, Sections 4075, 4078) and he is empowered to refuse them in his discretion.

Passports are not issued by American diplomatic and consular officers abroad, except in cases of emergency; and a citizen who is abroad and desires to procure a passport must apply therefor through the nearest diplomatic or consular officer to the Secretary of State.

Applications for passports by persons in Porto Rico or the Philippines should be made to the Chief Executives of those Islands. The evidence required of such applicants is the same as that required of applicants in the United States.

2. FEE. — By Act of Congress approved March 23, 1888, a fee of one dollar is required to be collected for every citizen's passport. That amount

in currency or postal money order should accompany each application made by a citizen of the United States. Orders should be made payable to the Disbursing Clerk of the Department of State. Drafts or checks will not be accepted.

3. APPLICATIONS. — A person who is entitled to receive a passport, if within the United States, must make a written application, in the form of an affidavit, to the Secretary of State. The application must be made by the person to whom the passport is to be issued and signed by him, as it is not competent for one person to apply for another.

The affidavit must be attested by an officer authorized to administer oaths, and if he has an official seal it must be affixed. If he has no seal, his official character must be authenticated by certificate of the proper legal officer.

If the applicant signs by mark, two attesting witnesses to his signature are required. The applicant is required to state the date and place of his birth, his occupation, the place of his permanent residence, and within what length of time he will return to the United States with the purpose of residing and performing the duties of citizenship.

The applicant must take the oath of allegiance to the Government of the United States.

The application must be accompanied by a description of the person applying, and should state the following particulars, viz: Age, ———; stature, ——— feet ——— inches (English measure); forehead, ———; eyes, ———; nose, ———; mouth, ———; chin, ———; hair, ———; complexion, ———; face, ———.

The application must be accompanied by a certificate from at least one credible witness that the applicant is the person he represents himself to be, and that the facts stated in the affidavit are true to the best of the witness's knowledge and belief.

4. NATIVE CITIZENS. — An application containing the information indicated by rule 3 will be sufficient evidence in the case of native citizens; but

A person of the Chinese race, alleging birth in the United States, must obtain from the Commissioner of Immigration or Chinese Inspector in Charge at the port through which he proposes to leave the country a certificate upon his application, under the seal of such officer, showing that there has been granted to him by the latter a return certificate in accordance with rule 16 of the Chinese Regulations of the Department of Commerce and Labor. For this purpose special blank forms of application for passports are provided.

Passports issued by the Department of State or its diplomatic or consular representatives are intended for identification and protection in foreign countries, and not to facilitate entry into the United States, immigration being under the supervision of the Department of Commerce and Labor.

5. A PERSON BORN ABROAD WHOSE FATHER WAS A NATIVE CITIZEN OF THE UNITED STATES. — In addition to the statements required by rule 3, his application must show that his father was born in the United States, resided

therein, and was a citizen at the time of the applicant's birth. The Department may require that this affidavit be supported by that of one other citizen acquainted with the facts.

6. NATURALIZED CITIZENS. — In addition to the statements required by rule 3, a naturalized citizen must transmit his certificate of naturalization, or a duly certified copy of the court record thereof, with his application. It will be returned to him after inspection. He must state in his affidavit when and from what port he emigrated to this country, what ship he sailed on, where he has lived since his arrival in the United States, when and before what court he was naturalized, and that he is the identical person described in the certificate of naturalization. The signature to the application should conform in orthography to the applicant's name as written in his certificate of naturalization, or an explanation of the difference should be submitted.

7. WOMAN'S APPLICATION. — If she is unmarried, in addition to the statements required by rule 3, she should state that she has never been married. If she is the wife or widow of a native citizen of the United States the fact should be made to appear in her application, which should be made according to the form prescribed for a native citizen whether she was born in this country or abroad. If she is the wife or widow of a naturalized citizen, in addition to the statements required by rule 3, she must transmit for inspection her husband's certificate of naturalization or a certified copy of the court record thereof, must state that she is the wife (or widow) of the person described therein, and must set forth the facts of his emigration, naturalization, and residence, as required in the rules governing the application of a naturalized citizen.

(A married woman's citizenship follows that of her husband so far as her international status is concerned. It is essential, therefore, that a woman's marital relations be indicated in her application for a passport, and that in the case of a married woman her husband's citizenship be established.)

8. THE CHILD OF A NATURALIZED CITIZEN CLAIMING CITIZENSHIP THROUGH THE NATURALIZATION OF THE PARENT. — In addition to the statements required by rule 3, the applicant must state that he or she is the son or daughter, as the case may be, of the person described in the certificate of naturalization, which must be submitted for inspection, and must set forth the facts of emigration, naturalization, and residence, as required in the rule governing the application of a naturalized citizen.

9. A RESIDENT OF AN INSULAR POSSESSION OF THE UNITED STATES WHO OWES ALLEGIANCE TO THE UNITED STATES. — In addition to the statements required by rule 3, he must state that he owes allegiance to the United States and that he does not acknowledge allegiance to any other government; and must submit affidavits from at least two credible witnesses having good means of knowledge in substantiation of his statements of birth, residence and loyalty.

10. EXPIRATION OF PASSPORT. — A passport expires two years from

the date of its issuance. A new one will be issued upon a new application, and, if the applicant be a naturalized citizen, the old passport will be accepted in lieu of a certificate of naturalization, if the application upon which it was issued is found to contain sufficient information as to the naturalization of the applicant. Passports are not renewed by the Department, but a person abroad holding a passport issued by the Department may have it renewed for a period of two years upon presenting it to a diplomatic or principal consular officer of the United States when it is about to expire.

11. WIFE, MINOR CHILDREN, AND SERVANTS. — When the applicant is accompanied by his wife, minor children, or servant who would be entitled to receive a passport, it will be sufficient to state the fact, giving the respective ages of the children and the allegiance of the servant, when one passport will suffice for all. For any other person in the party a separate passport will be required. A woman's passport may include her minor children and servant under the above-named conditions.

(The term servant does not include a governess, tutor, pupil, companion, or persons holding like relations to the applicant for a passport.)

12. TITLES. — Professional and other titles will not be inserted in passports.

13. BLANK FORMS OF APPLICATION. — They will be furnished by the Department to persons who desire to apply for passports, but are not furnished, except as samples, to those who make a business of procuring passports.

14. ADDRESS. — Communications should be addressed to the Department of State, Bureau of Citizenship, and each communication should give the post-office address of the person to whom the answer is to be directed.

Section 4075 of the REVISED STATUTES OF THE UNITED STATES, as amended by the Act of Congress, approved June 14, 1902, provides that "the Secretary of State may grant and issue passports, and cause passports to be granted, issued and verified in foreign countries by such diplomatic or consular officers of the United States, and by such chief or other executive officer of the insular possessions of the United States, and under such rules as the President shall designate and prescribe for and on behalf of the United States." The foregoing rules are accordingly prescribed for the granting and issuing of passports in the United States.

The Secretary of State is authorized to make regulations on the subject of granting and issuing passports additional to these rules and not inconsistent with them.

WM. H. TAFT.

THE WHITE HOUSE,

June 7, 1911.

We pass now to a consideration of those passports which may be issued to persons who are not citizens of the United States.

On June 6, 1906, the Committee on Foreign Affairs of the House of Representatives, through Hon. James Breck Perkins, reported:

It is the opinion of the committee that legislation is required to settle some of the embarrassing questions that arise in reference to citizenship, expatriation, and the protection of Americans abroad. * * * We should be glad if the Secretary of State would select some of the gentlemen connected with the State Department who have given special attention to these subjects, have them prepare a report and propose legislation that could be considered by Congress at the next session. * * * If a bill remedying such evils as may exist is submitted at the beginning of the next session it shall have the careful attention of this committee, and if its contents are approved we will make every endeavor to have it promptly enacted into law.⁷

This proposal came in place of a favorable report on the joint resolution which had passed the Senate April 13, 1906, providing for the appointment of a commission of persons, not all in the Department, to examine into the subjects of citizenship, expatriation and protection abroad and make recommendations for legislation if deemed advisable. Acting on the suggestion of the committee, Secretary Elihu Root appointed James Brown Scott, then the Solicitor of the Department, David Jayne Hill, then Minister of the United States to the Netherlands, and Gaillard Hunt, then Chief of the Passport Bureau, a board "to enquire into the laws and practice regarding citizenship of the United States, expatriation and protection abroad and report recommendations for legislation." Samuel B. Crandall, Ph. D., then a clerk in the Library of the Department, was detailed as Secretary of the Board. The result of the Board's labors was a report sent to the Speaker of the House of Representatives December 18, 1906, and printed by order of Congress,⁸ a volume 538 pages in length, the contents being the Board's recommendations and discussion and appendices giving judicial decisions on citizenship, texts of laws, tables of cases and laws of foreign countries, the whole constituting the most comprehensive compilation on the subject of nationality ever published.

⁷ Rept. No. 4784, 59th Cong., 1st Sess.

⁸ House Doc. No. 326, 59th Cong., 2d Sess.

One of the recommendations of the Board was

That the protection of this government be accorded to those who have made the declaration of intention to become citizens of the United States and who go abroad for brief sojourn, but that such protection should not be effective in the country of their origin and should not extend to those who have resided in the United States for a less period than three years.

Following this recommendation the Act of March 2, 1907, was passed, providing that qualified passports might be issued to persons who have made the declaration of intention to become citizens of the United States under such rules as the Secretary of State might prescribe.

The rules adopted by the Secretary of State are:

RULES GOVERNING THE GRANTING AND ISSUING OF PASSPORTS
TO THOSE WHO HAVE DECLARED THEIR INTENTION TO BE-
COME CITIZENS OF THE UNITED STATES.

1. The first section of the act approved March 2, 1907, "in reference to the expatriation of citizens and their protection abroad," provides "That the Secretary of State shall be authorized, in his discretion, to issue passports to persons not citizens of the United States as follows: Where any person has made a declaration of intention to become such a citizen as provided by law and has resided in the United States for three years, a passport may be issued to him entitling him to the protection of the Government in any foreign country: *Provided*, That such passport shall not be valid for more than six months and shall not be renewed, and that such passport shall not entitle the holder to the protection of this Government in the country of which he was a citizen prior to making such declaration of intention."

2. This section is not intended to confer upon persons who have only declared their intention to become citizens a general right to receive passports upon application. Such passports will be issued only when it is affirmatively shown to the Secretary of State that some special exigency requires the temporary absence of the applicant from the United States, and that without such absence the applicant would be subjected to special hardship or injury.

3. Such passports will not be issued to those who have made the declaration of intention and who have failed, through their own neglect, to complete their intention and secure naturalization as citizens of the United States; nor to those who may make the declaration of intention in order to secure passports and leave the United States, *nor shall more than one such passport be issued to any applicant.*

4. It is therefore ordered that before a passport shall be issued to anyone

who has made the declaration of intention to become a citizen of the United States *the following facts shall be established to the satisfaction of the Secretary of State:*

(a) That the applicant has resided in the United States for at least three years, as provided by law.

(b) That he is not yet eligible under the law for making application for final naturalization.

(c) *That at least six months have elapsed since the applicant's declaration of intention.*

(d) *That the applicant has not previously applied for and obtained a similar passport from this Department.*

(e) That a special and imperative exigency exists requiring the absence of the applicant from the United States. The burden of proof will, in each case, be upon the applicant to show to the satisfaction of the Secretary of State that there is a necessity for his absence.

(f) That the applicant has not applied for or obtained a passport from any other government since he declared his intention to become a citizen of the United States.

5. Applications must be made in the form of an affidavit to the Secretary of State.

6. The affidavit must be attested by an officer authorized to administer oaths, and if he has an official seal it must be affixed. If he has no seal his official character must be authenticated by certificate of the proper legal officer.

7. If the applicant signs by mark two attesting witnesses to his signature are required.

8. The applicant is required to state the date and place of his birth, his occupation and the place of his permanent residence, where he intends to travel, how long he expects to remain in each foreign country, for what purpose he is proceeding abroad, the circumstances which make his absence necessary, that he intends to return to the United States, and the probable duration of his absence therefrom.

9. *If any previous application for a similar passport has been denied by the Department, this fact must be stated by the applicant.*

The application must be accompanied by a description of the person applying and should state the following particulars, namely: Age, ———; stature, ——— feet ——— inches (English measure); forehead, ———; eyes, ———; nose, ———; mouth, ———; chin, ———; hair, ———; complexion, ———; face, ———.

The application must be accompanied by two supporting affidavits from citizens of the United States, who shall state that the applicant is the person he represents himself to be, how long they have known him, and that the facts stated in his affidavit are true to the best of their knowledge and belief.

ELIHU ROOT.

DEPARTMENT OF STATE.

Washington, March 23, 1907.

The form of the passport is:

[SEAL]

No.

UNITED STATES OF AMERICA,

DEPARTMENT OF STATE,

To all to whom these presents shall come, Greeting:

I, the undersigned, Secretary of State of the United States of America, hereby request all whom it may concern to permit

.....	a native of.....
Description.	who has resided in the United States
Age Years	for three years, and has declared his in-
Stature..... Ft..... In. Eng.	tention to become a citizen of the United
Forehead	States, as provided by law, safely and
Eyes	freely to pass, and in case of need to
Nose	give all lawful aid and
Mouth	protection.
Chin	This passport is not valid in
Hair It expires.....,
Complexion	19 , and is not subject to renewal.
Face	Given under my hand and the Seal

of the Department of State, at the City of Washington, the....day of, 190 , and of the Independence of the United States the one hundred and

Signature of the Bearer:

.....

There had been a few instances of the issuing of passports to those who had made the declaration of intention before this law was passed. One is found dated March 15, 1825, issued by Henry Clay; but it was irregular. The rule was correctly stated by Secretary William L. Marcy, in an instruction of January 10, 1854, to the American Chargé at Vienna:

It is true he left this country with a passport issued from this Department; but as he was neither a native born nor naturalized citizen he was not entitled to it. It is only to citizens that passports are issued.⁹

⁹ Lawrence's Wheaton, Ed. 1863, p. 929.

During the Civil War, however, there was a brief period when declarants were entitled to receive passports. The Act of March 3, 1863, "for enrolling and calling out the national forces" included as liable to military duty "all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared on oath their intention to become citizens under and in pursuance of the laws thereof."¹⁰ The government having called upon those who had taken the first steps to become American citizens to protect it, acknowledged the reciprocal obligation to protect them by enacting on the same date that the law prohibiting the issuance of passports to those not citizens of the United States should not apply to persons liable to military duty.¹¹ The Act was repealed May 30, 1866.¹² Only a few passports were issued under it. The form used was the same as that of the regular passport, except that the blank space for the name had these words added: "who is lawfully liable to military duty in this country and who has declared his intention to become a citizen of the United States."

The result of the war with Spain brought a new feature into the subject of protection of Americans abroad by erecting a new class of persons not citizens of the United States and yet clearly entitled to receive the protection of this government because, as a result of the annexation of territory, they owed it allegiance and were not citizens of any other country. As long as the question of their citizenship was pending before the federal courts, the Department did not issue passports to them, as to do so would have been tantamount to an expression of opinion on the Department's part that they were citizens of the United States. It did, however, extend its protection to certain residents of the insular possessions who applied for it. The Supreme Court having decided that they were not citizens of the United States, the Department asked Congress for an amendment to the passport laws which would permit passports to be issued to them and also permit the chief executives of the insular possessions to

¹⁰ 12 Stat. 731.

¹¹ 12 Stat. 754.

¹² 14 Stat. 54.

issue passports under the same regulations as apply to their issuance by diplomatic and consular officers, and the Act of June 14, 1902, gave such authority. The form of passport is as follows:

Good only for
two years from date.

[SEAL]

UNITED STATES OF AMERICA,

ISLAND OF PORTO RICO,

To all to whom these presents shall come, Greeting:

I, the undersigned, Governor of Porto Rico,

hereby request all whom it may concern to permit

Conrado Palau y Diaz

a Citizen of Porto Rico,

owing allegiance to the United States,
with his wife and children safely
and freely to pass, and in case of
need to give *them* all lawful Aid
and Protection.

Given under my hand and the
Seal of Porto Rico, at the

City of San Juan,

the *18th* day of *May* in the
year 1908, and of the Independ-
ence of the United States the
one hundred and *thirty-second*.

W. F. Willoughby.

Description,

Age, *43* years.

Stature, *5* Feet, *8¼* Inches Eng.

Forehead, *high*.

Eyes, *brown*.

Nose, *regular*.

Mouth, *regular*.

Chin, *round*.

Hair, *black*.

Complexion, *light*.

Face, *regular*.

[SEAL]

Signature of the Bearer,

C. Palau.

By the Acting Governor,

D. A. Skinner,

Acting Secretary of Porto Rico.

No. 280.

It is issued under the following rules:

RULES GOVERNING THE GRANTING AND ISSUING OF PASSPORTS
IN THE INSULAR POSSESSIONS OF THE UNITED STATES.

Section 4075 of the Revised Statutes of the United States, as amended by the act of Congress, approved June 14, 1902, providing that "the Secretary of State may grant and issue passports, and cause passports to be granted,

issued and verified in foreign countries by such diplomatic or consular officers of the United States, and by such chief or other executive officer of the insular possessions of the United States, and under such rules as the President shall designate and prescribe for and on behalf of the United States", the following rules are hereby prescribed for the granting and issuing of passports in the insular possessions of the United States:

1. **BY WHOM ISSUED.**—Application for a passport by a person in one of the insular possessions of the United States should be made to the Chief Executive of such possession.

A person who is entitled to receive a passport if temporarily abroad should apply to the diplomatic representative of the United States in the country where he happens to be; or, in the absence of a diplomatic representative, to the consul-general of the United States; or, in the absence of both, to the consul of the United States. The necessary statements may be made before the nearest consular officer of the United States.

2. **TO WHOM ISSUED.**—The law forbids the granting of a passport to any person who does not owe allegiance to the United States.

A person who has only made the declaration of intention to become a citizen of the United States can not receive a passport.

3. **APPLICATIONS.**—A person who is entitled to receive a passport must make a written application in the form of an affidavit.

The affidavit must be attested by an officer authorized to administer oaths, and if he has an official seal it must be affixed. If he has no seal, his official character must be authenticated by certificate of the proper legal officer.

If the applicant signs by mark, two attesting witnesses to his signature are required.

The applicant is required to state the date and place of his birth, his occupation, and the place of his permanent residence, and to declare that he goes abroad for temporary sojourn and intends to return to the United States or one of the insular possessions of the United States with the purpose of residing and performing the duties of citizenship therein.

The applicant must take the oath of allegiance to the Government of the United States.

The application must be accompanied by a description of the person applying, and should state the following particulars, viz: Age, ———; stature, ——— feet ——— inches (English measure); forehead, ———; eyes, ———; nose, ———; mouth, ———; chin, ———; hair, ———; complexion, ———; face, ———.

The application must be accompanied by a certificate from at least one credible witness that the applicant is the person he represents himself to be, and that the facts stated in the affidavit are true to the best of the witness's knowledge and belief.

4. **NATIVE CITIZENS OF THE UNITED STATES.**—An application containing the information indicated by rule 3 will be sufficient evidence in the case of native citizens of the United States.

5. A PERSON BORN ABROAD WHOSE FATHER WAS A NATIVE CITIZEN OF THE UNITED STATES. — In addition to the statements required by rule 3, his application must show that his father was born in the United States, resided therein, and was a citizen at the time of the applicant's birth. The Department may require that this affidavit be supported by that of one other citizen acquainted with the facts.

6. NATURALIZED CITIZENS. — In addition to the statements required by rule 3, a naturalized citizen must transmit his certificate of naturalization, or a duly certified copy of the court record thereof, with his application. It will be returned to him after inspection. He must state in his affidavit when and from what port he emigrated to this country, what ship he sailed in, where he has lived since his arrival in the United States, when and before what court he was naturalized, and that he is the identical person described in the certificate of naturalization. The signature to the application should conform in orthography to the applicant's name as written in his certificate of naturalization.

7. WOMAN'S APPLICATION. — If she is unmarried, in addition to the statements required by rule 3, she should state that she has never been married. If she is the wife of a native citizen of the United States the fact should be made to appear in her application. If she is the wife or widow of a naturalized citizen, in addition to the statements required by rule 3, she must transmit for inspection her husband's certificate of naturalization, must state that she is the wife (or widow) of the person described therein, and must set forth the facts of his emigration, naturalization, and residence, as required in the rule governing the application of a naturalized citizen.

8. THE CHILD OF A NATURALIZED CITIZEN CLAIMING CITIZENSHIP THROUGH THE NATURALIZATION OF THE PARENT. — In addition to the statements required by rule 3, the applicant must state that he or she is the son or daughter, as the case may be, of the person described in the certificate of naturalization, which must be submitted for inspection, and must set forth the facts of emigration, naturalization, and residence, as required in the rule governing the application of a naturalized citizen.

9. A RESIDENT OF AN INSULAR POSSESSION OF THE UNITED STATES WHO OWES ALLEGIANCE TO THE UNITED STATES. — In addition to the statements required by rule 3, he must state that he owes allegiance to the United States and that he does not acknowledge allegiance to any other government; and must submit an affidavit from at least two credible witnesses having good means of knowledge in substantiation of his statements of birth, residence, and loyalty.

10. EXPIRATION OF PASSPORT. — A passport expires two years from the date of its issuance. A new one will be issued upon a new application and, if the applicant be a naturalized citizen, the old passport will be accepted in lieu of a certificate of naturalization, if the application upon which it was issued is found to contain sufficient information as to the naturalization of the applicant.

11. WIFE, MINOR CHILDREN, AND SERVANTS. — When the applicant is ac-

accompanied by his wife, minor children, or servant who would be entitled to receive a passport, it will be sufficient to state the fact, giving the respective ages of the children and the allegiance of the servant, when one passport will suffice for all. For any other person in the party a separate passport will be required. A woman's passport may include her minor children and servant under the above named conditions.

12. PROFESSIONAL TITLES. — They will not be inserted in passports.

13. REJECTION OF APPLICATION. — The Chief Executive Officers of the insular possessions of the United States are authorized to refuse to issue a passport to anyone who there is reason to believe desires it for an unlawful or improper purpose, or who is unable or unwilling to comply with the rules.

THEODORE ROOSEVELT.

OYSTER BAY, NEW YORK, *July 19, 1902.*

The passport issued by the Department to foreigners travelling in the United States is in a class by itself. It is the safe-conduct, formerly issued frequently, and is the document usually described in works on international law as a passport. So far as this country is concerned, it is useless in time of peace and is rarely issued. One issued by John Quincy Adams, October 23d, 1824, to the Argentine Minister who was about to go home on leave was worded:

Whereas General Charles d'Albeer, Minister Plenipotentiary from the Republic of Buenos Ayres to the United States, has made known to this Government, that he is soon to return to Buenos Ayres upon a leave of absence, These are therefore to request all Persons, Citizens of the United States, especially officers Naval or Military, of the same to permit him safely and freely to pass, etc.

The form now used is:

Know ye, that the bearer hereof [full name and title] is about to travel abroad.

These are therefore to request all officers of the United States, or of any state thereof to permit him to pass freely, without let or molestation, and to extend to him all friendly aid and protection in case of need.

Foreign ministers in the United States used to apply for these passports occasionally; now they do so very seldom, the Department issuing hardly more than one in a year. This is the form of passport which is given by the government to a foreign minister when it refuses to recognize him any longer — when he is "given his passports" as the phrase is. It is the form which would be given a

foreign minister if he should break off his friendly residence near this government and "demand his passports," as the phrase is.

Useless in time of peace, safe conducts have been invoked in time of war as necessary. They were not used extensively during wars previous to the Civil War, but during that conflict they were used frequently. They were addressed

To all to whom these presents shall come, Greeting:

And in particular the Military and Civil Authorities of the United States.

Passports from foreigners entering the United States have never been required under our law except in time of war. The practice is irregular and governed by the exigencies. On August 19, 1861, an order was issued by Secretary Seward that "no one be allowed to go abroad from a port of the United States without a passport nor to land without one." The safe conducts and passports issued by the Secretary were recorded in the usual way; but many safe-conducts were issued by the military authorities.

As all regular passports issued in the United States are signed with the Secretary of State's name, the physical labor of the signing has presented a serious problem, which has been avoided in most cases by the use of a rubber or metal stamp made in facsimile of the Secretary's signature. When Secretary Root assumed charge of the Department he ordered the discontinuance of the use of the stamp. A memorandum of October 25, 1905, from the Passport Bureau said:

Passports are more valuable if signed by the pen than if signed by the stamp. We received information in 1899 from our (then) Legation at Vienna that the Austro-Hungarian Government often required statements from our diplomatic and consular agents to show that our passports were the documents they purported to be, and in South American countries the authorities frequently require authentication of the signature of the Secretary on the passports. The practice heretofore has not been uniform in respect to the use of the stamped signature on passports. Thus, Mr. Fish signed his name; Mr. Evarts used the stamp; so did Mr. Blaine and Mr. Frelinghuysen, but Mr. Bayard used the pen; Mr. Blaine again used the stamp; so did Mr. Foster, Mr. Gresham, Mr. Olney, Mr. Sherman, Mr. Day and Mr. Hay. The question was brought before Mr. Hay, but he refused to change the existing practice. If the

Secretary signs the passports he will have to sign about 16,000 a year, and, in the spring of the year, from 90 to 150 a day.

The difficulty was finally solved by having the facsimile of the Secretary's signature engraved on the passport plate.

With reference to authority for issuing passports, Secretary Root prescribed the method of issuance:

DEPARTMENT OF STATE,

WASHINGTON, *January 3, 1906.*

The following rule is established for the issue of passports:

Upon the coming in of applications for passports the Chief of the Passport Bureau will, as heretofore, examine the evidence in support of each application. He will certify each day to the Secretary of State a list of the applicants whose citizenship and right to receive passports he finds to be established by such evidence.

The approval of the Secretary or Acting Secretary upon such list will be authority to the Chief of the Passport Bureau to affix the seal of the Department to, and to issue, in behalf of the Secretary of State, passports to the applicants so certified and approved.

The Chief of the Passport Bureau may, if occasion requires, certify such lists to the Secretary more frequently than once a day.

ELIHU ROOT.

The same difficulty with reference to the signature on passports was presented in the question of signing authentications under the Department's seal. The memorandum of the Chief of the Passport Bureau, October 25, 1905, said:

As for the certificates of authentication, these were formerly signed with the pen and much delay and inconvenience in the transaction of public business resulted, for the requests for authentication come in at all hours of the day and often should be signed at once. After the use of the stamp began here, the Attorney General continued to sign with the pen, and lawyers doing business with us frequently commented upon the greater facility encountered here. The Attorney General, accordingly, abolished the use of the pen, and his signature is now affixed by a stamp as our Secretary's is. No instance has come to our attention of the refusal of a court or other public authorities to accept the authentications signed by the stamp. I do not believe anything would be gained by changing the practice in respect to authentications. Owing to the character of the papers and the irregularity with which they are presented to us for authentication, I am convinced that the Secretary would be put to incessant vexation if he were obliged to sign these documents.

"Nevertheless the use of stamps is to be discontinued. E. R." was the endorsement made by Secretary Root on this memorandum. A way out of the difficulty was found by the Secretary designating the duty of signing the authentications to the Chief Clerk.

[1905]

It is hereby ordered that certificates which have heretofore been authenticated under the signature of the Secretary of State and the seal of the Department of State, shall hereafter be authenticated under the seal of the Department by the Chief Clerk, acting for the Secretary. The form of authentication shall be as follows:

"In testimony whereof I, Elihu Root, Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name to be subscribed by the Chief Clerk of the said Department, at the city of Washington, this day of, 190...

....., Secretary of State,
by....., Chief Clerk."

ELIHU ROOT,

Secretary of State.

By order of February 23, 1909, this was modified by Secretary Robert Bacon so that the authentication is under the name of the Chief of the Bureau of Citizenship instead of the Chief Clerk.

The sixth section of the Act creating the Department provided:

That there shall be paid to the Secretary, for the use of the United States, the following fees of office, by the persons requiring the services to be performed, except when they are performed for any officer of the United States, in a matter relating to the duties of his office, to wit; for making out and authenticating copies of records, ten cents for each sheet containing one hundred words; for authenticating a copy of a record or paper, under seal of office, twenty-five cents.

The amount received for affixing the seal was never large. A memorandum shows it was: for 1850, \$102.25; for 1851, \$95.00; for 1852, \$154.50; for 1853, \$33.50.¹³ By Act of April 23, 1856,¹⁴ it was abolished.

It is doubtful whether this law was not intended to include practically all of the Department's authentications, although the authenti-

¹³ Register of certificates, Bur. of Citizenship.

¹⁴ 11 Stat. 5.

cation is usually a certification of the genuineness of some other seal and not of the document to which the other seal is affixed.

In order that it may have actual knowledge of the seals which it certifies to, the Department has impressions of them. To name them is to give the list of the seals which the Department has authority to certify to:

The seals of all the Executive Departments, of the Library of Congress (Copyright office, the Library itself having no seal), the Smithsonian Institution, the States and Territories, Porto Rico, the Philippines. On one occasion, at least, it certified to the seal of the Senate. This was in 1896 when John Hays Hammond, an American citizen, being condemned to death for participating in an attempt to overthrow the government of the (then) Transvaal Republic, the desire for his pardon, which was universal in the United States, and which under the circumstances could receive no official sanction, found expression in a petition to the Transvaal Government signed by all the members of the United States Senate each acting in a private character. To the petition was affixed a certificate under the seal of the Senate that the signers were Senators. Upon request, and in view of the fact that there was no other authority which a foreign government would recognize, the State Department certified to the genuineness of the seal of the Senate. The incident was not based on precedent, nor would it, probably, be deemed a precedent. On April 17, 1873, the Assistant Secretary of State wrote to the Librarian of Congress:

This Department cannot certify that Mr. Howe is Chairman of the Joint Committee on the Library of Congress. If you can verify the contract to the satisfaction of the respective parties before Chief Justice Cartter or one of the Associate Justices of the Supreme Court of the District of Columbia, this Department will attach an additional certificate to that of the Justice, in authentication of his official acts.¹⁵

When this letter was written the federal judges received their commissions under the seal of the Department of State. The theory is that the Department can certify only to such seals, acts or officers as it has official cognizance of.

¹⁵ Vol. IV, Passport press copy book, p. 58.

The form of authentication used to be:

I certify that the document hereunto annexed is under the seal of the
and is entitled to full faith and credit.

Sometimes unscrupulous persons, obtaining the Department's authentication of a State seal which had been affixed to a certificate of incorporation, would use it as a bait to unwary investors representing that the government vouched for the credit of the corporation. The Department would, of course, refuse an authentication which was designed for such a use; but it has no means of knowing the purpose for which it is desired. A flagrant case of attempted imposition upon the public occurred in 1906, and the Second Assistant Secretary, Mr. Adey, raised the question whether it might not be well to change the wording of the certificate. In a memorandum dated August 6, 1906, he said:

The words "full faith and credit" in the Department's certification might be construed by an ignorant speculative investor as a guarantee of credit and standing. Would it not suffice to merely certify to the seal?

It was true that the State seal never certified to the deed or articles of incorporation, but simply to the deposit or recording of the document; but it was deemed important to do whatever was possible to prevent deception. The Solicitor, Mr. Scott, in his memoranda of August 15 and September 1, 1906, prescribed this form which is now in use:

UNITED STATES OF AMERICA,

[SEAL]

DEPARTMENT OF STATE,

To all to whom these presents shall come, Greeting:

I CERTIFY That the document hereunto annexed is under the Seal of the, and that such Seal is entitled to full faith and credit.

At the bottom appear these words:

For the contents of the annexed document the Department assumes no responsibility.

This form applies to authentications of seals. When the Department certifies to copies from the files or records it uses the following form:

I certify that the document hereto annexed is a true copy from the [files or records] of this Department.

When it certifies to a law it uses this form:

I certify that hereunto annexed is a true copy of an Act of Congress, approved, the original of which is on file in this Department, entitled "An Act....."

It certifies to a foreign diplomatic officer in this form:

I certify that [name of officer] whose name is subscribed to the paper hereto annexed, is duly accredited to this Government as [title].

For an American diplomatic or consular officer the form is:

I CERTIFY That.....
whose name is subscribed to the paper hereto annexed, was at the time of
subscribing the same [office held].....
of the United States at [place or country].....
duly commissioned; and that full faith and confidence are due to his acts as
such.*

IN TESTIMONY WHEREOF, I.....
Secretary of State, have hereunto caused the Seal of
the Department of State to be affixed and my name
to be subscribed by the Chief of the Bureau of Citizen-
ship of the said Department, at the City of Washing-
ton, this day of, 191

.....
Secretary of State.

By
Chief, Bureau of Citizenship.

* For the contents of the Annexed
Document the Department assumes
no responsibility.

The rules for authentications were first formulated and adopted
October 10, 1906:

AUTHENTIFICATIONS.

The Department of State does not affix its certificate of authentication to documents under the seals of courts, notaries public, commissioners of deeds, justices of the peace, inferior State or Territorial officers, bureaus of other Federal Executive Departments, colleges, corporations, etc.

The enclosed document should, therefore, bear the seal of the.....
.....before it can be
authenticated by this Department.

FEE.

Under the law (act of April 23, 1856) no fee is charged for a certificate of authentication issued by this Department.

NATURE OF DOCUMENT.

In mailing a document to this Department with a request for its authentication, the letter of transmittal should always state the nature of the document, as power of attorney, certificate of birth, death, or marriage, testament or will, etc.

CERTIFICATE FROM A REPRESENTATIVE OF A FOREIGN GOVERNMENT.

It is not within the province of this Department to procure from a representative of a foreign government a certificate of authentication, and application should be made direct to the proper foreign representative.

ADDRESS.

All communications relating to authentication should be addressed to the Department of State, Passport Bureau [Bureau of Citizenship], Washington, D. C.

By order of the Secretary of State.

DEPARTMENT OF STATE, *October 10, 1906.*

The Bureau of Citizenship which issues passports and authentications also prepares letters of introduction to the diplomatic and consular officers for American citizens who are especially recommended to the Secretary of State. The general rule is that they are issued only upon recommendation of public officers; but the Secretary of State issues them directly according to his pleasure. The form used varies, but is usually as follows:

To the Diplomatic and Consular Officers of the United States.
Gentlemen:

At the instance of the honorable.....
a Representative of the Congress of the United States from the state of
....., I take pleasure in introducing to you.....
of who is about to proceed abroad. I cordially
bespeak for Mr. such courtesies as you may be able
to extend to him consistently with your official duties.

[Signed by the head of the Department.]

It was found that these letters were mistaken by some travellers as serving the purpose of passports, and they were sometimes obtained

by people who were not entitled to receive passports. To remedy this evil, a notice was prepared in 1901 and since then has accompanied all introductory letters:

The enclosed letter of introduction to the Diplomatic and Consular Officers of the United States has no uses authorized by law or custom among the officials of foreign governments, and does not take the place or serve the purpose of the official passport issued by this Government.

DEPARTMENT OF STATE,

Washington, March 27, 1901.

The Department has always regarded the letters as an evil and has sought on several occasions to abolish them.

On January 12, 1855, Secretary Marcy said they had "long been discontinued," because diplomatic and consular officers complained that they caused inconvenience and trouble,¹⁶ but they were resumed thereafter. In 1880 the Department printed the following form letter:

DEPARTMENT OF STATE,

WASHINGTON,

18

Sir:

I have the honor to reply to your request of the for an introductory letter for and to inform you that the practice of the Department for many years has restricted the issuance of such letters to those departing from this country in connection with official business, or who occupy positions of high public responsibility.

This rule has in recent years been temporarily relaxed in favor of private citizens, but the experience so gained has convinced the Department that the former custom is well founded and should be resumed.

The passport for travel issued by the Department is fully sufficient to introduce the bearer to any officer whom he may wish to meet, and to secure from him the kindly civilities naturally due to countrymen in a strange land.

An additional letter, however, from the Secretary, is too often regarded as suggesting special courtesies from our officers which must involve an expenditure of time and money not contemplated by the laws fixing the duties and salaries of the Consular service.

I do not, therefore, feel at liberty to supply you with other papers than the enclosed blank applications and directions, which may be of service to you should a passport be desired.

I have the honor to be, Sir,

Your obedient servant,

¹⁶ Quoted in Moore's Digest, IV, 785.

This was followed by a circular instruction to our officers abroad:

DEPARTMENT OF STATE.

WASHINGTON, April 25, 1881.

To the Diplomatic and Consular Officers of the United States.

Gentlemen:

Letters of introduction in favor of American citizens traveling abroad will hereafter only be issued to officers of the government, or in cases where some special reason may make it the interest of the Department to commend some one to your consideration for a particular purpose. The practice of granting general introductory letters to facilitate travel will be discontinued.

With regard to outstanding letters of introduction, I have to observe that personal commendation to your courteous attentions is not to be construed as importing any claims to the hospitalities of the representatives of the United States abroad, or as requiring more than the kindly civilities which are naturally due to countrymen in a strange land, and which it is presumed they uniformly receive at your hands. For such purpose, a passport, or evidence of citizenship and identity is thought to be sufficient. Under no circumstances is it intended that the recommendation of the Department should entail any charge on you, or constrain you to render personal service to a visitor to the detriment of the business of your office.

I am, gentlemen,

Your obedient servant,

Nevertheless the free issuance of the letters was soon resumed and has continued ever since.

GAILLARD HUNT.

[The next section will be devoted to a further consideration of the duties of the Department.]

**BOARD OF EDITORS OF THE AMERICAN JOURNAL
OF INTERNATIONAL LAW**

CHANDLER P. ANDERSON, Washington, D. C.
CHARLES NOBLE GREGORY, George Washington University.
AMOS S. HERSHEY, Indiana University.
CHARLES CHENEY HYDE, Chicago, Ill.
GEORGE W. KIRCHWEY, Columbia University.
ROBERT LANSING, Watertown, N. Y.
JOHN BASSETT MOORE, Columbia University.
GEORGE G. WILSON, Harvard University.
THEODORE S. WOOLSEY, Yale University.

Editor in Chief

JAMES BROWN SCOTT, Carnegie Endowment for International Peace,
Washington, D. C.

Business Manager

GEORGE A. FINCH, 2 Jackson Place, Washington, D. C.

EDITORIAL COMMENT

TRIPOLI

On September 23, 1911, the Italian Government delivered a note to the Minister of Foreign Affairs of the Ottoman Empire pointing out the dangers to which Italian subjects were exposed in Tripoli and Cyrenaica and intimating the need of taking military action. The Turkish Government replied that Italian subjects were not exposed to danger, that normal conditions existed in Tripoli and Cyrenaica, and that it would guarantee the safety of Italian subjects. The reply of the Ottoman Government was considered unsatisfactory, and on September 28th the Italian Government sent an ultimatum setting forth its grievances and stating its intention to proceed to military occupation of the provinces, concluding with the demand for a satisfactory reply within

twenty-four hours from the presentation of the ultimatum, "in default of which the Italian Government will be obliged to proceed to the immediate execution of the measures destined to insure the occupation." The reply of Turkey, couched in conciliatory language, requested a statement of the guarantees which Italy would require for its subjects and its interests, promising to accept them as far as compatible with its territorial integrity, and binding itself not to modify existing military conditions in Tripoli and Cyrenaica during the negotiations, which the Turkish Government hoped would lead to an amicable adjustment of the difficulties. The reply of Turkey was deemed unsatisfactory, and at the expiration of the twenty-four hours specified in the Italian ultimatum, Italy issued, on September 29, 1911, a formal declaration of war against Turkey, and on the same day issued orders for a bombardment of Tripoli by the Italian fleet under the command of Admiral Aubry.

It is not the purpose of the present comment to enter into a detailed discussion of the causes of the war or its method of prosecution, but to call attention to the haste with which hostilities were begun, without, apparently, exhausting the peaceful methods available for the settlement of the dispute between the two governments regarding the situation existing in Tripoli and Cyrenaica. For the present purpose it will only be necessary to examine three documents, namely: the ultimatum, the Turkish reply, and the Italian declaration of war.

As the case of the Italian Government depends upon the grievances set forth in the ultimatum it may be well to refer to the points enumerated in this document, the text of which is printed in the SUPPLEMENT to this issue.¹ The first paragraph may be disregarded by reason of the generalities which it contains. The next paragraph states in unequivocal terms: "all enterprises on the part of the Italians, in the aforesaid regions, constantly encounter systematic opposition of the most obstinate and unwarranted kind." The next paragraph states, without specifying, that Turkey has "displayed constant hostility toward all legitimate Italian activity in Tripoli and Cyrenaica," and declares it useless to discuss the proposal of Turkey "to grant any economic concession compatible with the treaties in force and with the higher dignity and interests of Turks," because the uselessness of such negotiations has been demonstrated by past experience and that such negotiations, "far from constituting a guarantee for the future, could but afford a permanent

¹ SUPPLEMENT, p. 11.

cause of friction and conflict." The ultimatum then represents that on information received through Italian consular agencies, "the situation there is extremely dangerous on account of the agitation prevailing against Italian subjects, which is very obviously fomented by officers and other organs of the authorities." The Italian Government declares the agitation to constitute "an imminent danger not only to Italian subjects, but also to foreigners of any nationality who, justly perturbed and anxious for their safety, have commenced to embark, and are leaving Tripoli without delay." The arrival at Tripoli of Turkish military transports is regarded as aggravating the situation, and the Italian Government, finding itself, in view of all the circumstances, "forced to think of the guardianship of its dignity and its interests, has decided to proceed to the military occupation of Tripoli and Cyrenaica," and requests the Turkish Government to give the requisite orders so that the occupation "may meet with no opposition from the present Ottoman representatives, and that the measures which will be the necessary consequence may be effected without difficulty." Italy thus stated its intention to cut the Gordian knot, but expressed willingness to enter into negotiations after occupation, "to settle the definitive situation arising therefrom." Such is the Italian view of the situation, and it must have been regarded as very serious to announce the impending occupation, which, under ordinary circumstances, could only result in war.

The Turkish reply states that a careful examination of the events of the last three years fails to disclose any hostility "to Italian enterprises relating to Tripoli and Cyrenaica."¹ On the contrary, the Turkish Government insists that "it has always appeared to her normal and reasonable that Italy should cooperate by its capital and industrial activity in the economic regeneration of this part of the empire." The Turkish note calls attention to the fact that it has always welcomed propositions of this nature and that it was animated by a desire to cultivate and maintain friendly relations with the Italian Government when it recently proposed "an arrangement based upon economic concessions likely to furnish Italian activity a vast field of operation in the said provinces." The note then states positively that "not only is there at this time no agitation in these countries and even less of inflaming propaganda, but the officers and other agencies of Ottoman authority have as their mission the safeguarding of order, a mission which they perform conscientiously."

Turning to the Italian grievance of a military expedition to Tripoli, the Turkish Government insists that but a single transport was sent, and

¹ For text see SUPPLEMENT, p. 12.

that several days previous to the note of September 26th, and that this expedition had no troops on board and could only have a reassuring effect upon the people.

The final paragraph of the Turkish reply states what it conceives to be the essential grievance of the Italian Government, and its willingness to adjust the difficulties peaceably. Thus:

Reduced to its essential terms the actual disagreement resides in the absence of guarantees likely to reassure the Italian Government regarding the economic expansion of interests in Tripoli and in Cyrenaica. By not resorting to an act so grave as a military occupation, the Royal Government will find the Sublime Porte quite agreeable to the removal of the disagreement.

Therefore, in an impartial spirit, the Imperial Government requests that the Royal Government be good enough to make known to it the nature of these guarantees, to which it will readily consent, if they are not to affect its territorial integrity. To this end it will refrain, during the parleys, from modifying in any manner whatever the present situation of Tripoli and of Cyrenaica in military matters; and it is to be hoped that, yielding to the sincere disposition of the Sublime Porte, the Royal Government will acquiesce in this proposition.

As previously stated, it thus appears that the Turkish Government was willing to examine Italy's grievances, and, so far as territorial integrity would permit, to redress them in order to maintain peace between the two countries.

The Italian Government considered, as previously stated, the reply of the Turkish Government to its ultimatum as unsatisfactory, and on September 29, 1911, issued the following declaration of war:

Though the term granted by the Royal Government to the Imperial Government for carrying out certain measures which had become necessary has expired, no satisfactory reply has been received by the former government. The lack of such reply is confirmatory evidence either of the ill-will or of the powerlessness of which the Imperial Government and authorities have given so many proofs, particularly with regard to Italian rights and interests in Tripoli and Cyrenaica. The Royal Government is in consequence obliged to safeguard its rights and interests together with its honor and dignity by all means at its disposal. The result can only be regarded as the necessary, if painful, consequences of the conduct of the authorities of the Ottoman Empire. Friendly and pacific relations between the two States being thus broken off, Italy henceforth is at war with Turkey.

From one point of view the situation is regular. The forms of law regarding the ultimatum and the declaration of war are in accordance with the Hague Convention relating to the opening of hostilities, the essential paragraphs of which follow:

The contracting powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war. (Article 1.)

The existence of a state of war must be notified to the neutral powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph. Neutral powers, nevertheless, can not rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war. (Article 2.)

In the absence of a detailed statement as to the grievances asserted by Italy, no opinion is expressed as to the sufficiency of the causes leading to the declaration of war.

Supposing that the contentions of Italy were well founded, it would have a grievance against Turkey. If this grievance were capable of being formulated as a right of which Italy was deprived, the question of the existence or non-existence of the right, its nature and extent, could be submitted to the Permanent Court of The Hague. If, however, the grievance could not assume the form of a claim of right, but falls within the category of cases outside the realm of international law, that is to say, if the claim is based upon a national policy, it is a political question, or, as Italy puts it, "a vital interest," and as such might be the subject of negotiation, not of arbitration. In this view of the matter the action of Italy would be none the less precipitous and in contravention of the conduct properly expected of a nation which has for years championed the cause of the peaceful settlement of international disputes.

In 1856 Sardinia was a party to the Congress of Paris in which the integrity of Turkey and the doctrine of good offices and mediation in Turkish affairs was announced and accepted. Of more serious significance were the international obligations assumed by Italy when a formal international statute was enacted which it was hoped would begin a new era in the relations of nations. In 1899 Italy participated in the First Hague Peace Conference, and Count Nigra, its first delegate, played an enviable and important role in framing the Convention for the Peaceful Settlement of International Disputes. And again in the Second Hague Peace Conference of 1907, the influence of Italy was felt in all questions concerning the peaceful settlement of international disputes. An examination of the provisions of the Convention for the Peaceful Settlement of International Disputes adopted by the First Hague Conference, and revised by the second, will show that in its eagerness to possess itself of Tripoli and Cyrenaica, Italy has unfortunately violated the spirit, if

not the letter, of those sections of the convention dealing with good offices and arbitration. Thus, the first article of this convention provides:

With a view to obviating, as far as possible, recourse to force in the relations between States, the signatory powers agree to use their best efforts to insure the pacific settlement of international differences.

In the next article the signatory Powers agree:

In case of serious disagreement or conflict, before an appeal to arms — to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly powers.

It is as apparent that a disagreement existed as that an armed conflict now exists between Italy and Turkey, and that Italy has not requested either "the good offices or mediation of one or more friendly Powers," but has declined to accept offers of good offices or of mediation at the request of Turkey or of the Powers.

It may be said that the Powers themselves have been remiss in insisting upon good offices and mediation, but the fault of the strangers to the conflict is no justification for Italy to have discarded the wise and just provisions of an international convention to which it is a party, when the opportunity was presented of furnishing to the Powers an example of recourse to peaceable methods of settling the dispute.

The truth of the matter seems to be that in whatever form the controversy had presented itself, Italy would have been unwilling to listen to advice and mediation to submit the case to arbitration, providing it might be reasonably maintained that it was susceptible of arbitration.

The available lands of northern Africa are no longer open to discovery or occupation. In Egypt, Great Britain plays the role of schoolmaster, but the occupation, temporary in its beginning, is likely to prove permanent unless the highway to India should assume less importance in the future than it does in the present. The conquest of Algiers by France, and its incorporation with the Republic, the acquisition of a protectorate in 1881 over Tunis, and the undisguised intention of France to extend its empire to the east and to consolidate it by the acquisition of Morocco, suggested, no doubt, to Italy the advisability of seizing Tripoli and Cyrenaica while they were still in the possession of a Power rightly or wrongly reputed weak. When successful in establishing a protectorate in Morocco, it might have occurred to the ambitious statesmen of the French Republic to extend their sphere of influence from Tunis to Egypt, and the golden opportunity to annex Tripoli and Cyrenaica would have been

lost to Italy, even although their acquisition is now sought at the expense of inconsistency and of the wise and just provisions of an international document.

It would seem that the universal disapproval with which the action of Italy has been regarded is in itself evidence of a growing international opinion based upon a respect of elemental law and justice, and there are not wanting evidences to show that Italian statesmen have betimes qualms of conscience. Thus Italy is represented in the press as willing to pay a goodly number of millions to quiet title to Tripoli and Cyrenaica, which were formally annexed to the kingdom on November 6, 1911. In the United States this suggestion is likely to be attributed to its proper source, for we, as a nation and a people, have endeavored to satisfy the conscience aroused by an unjust war, by a formal purchase of territory which we had already occupied and conquered. By the treaty of Guadalupe-Hidalgo the United States bound itself to pay Mexico the sum of \$15,000,000 for the territory acquired by an unjust and unjustifiable war, and there are perhaps some people still living who would be inclined to attribute this payment as due to some other cause than the inestimable value of the land in question to the United States. Pot may well call kettle black.

RUSSIA AND PERSIA.

While the state of affairs in Persia is still too unsettled for it to be possible to predict the outcome, it is well to point out what the situation means for the independence and sovereignty of Persia. On August 18/31, 1907, a convention was signed between Great Britain and Russia¹ the general object of which was "to settle by mutual agreement different questions concerning the interests of their states on the continent of Asia." In that treaty the two Powers while engaging "to respect the integrity and independence of Persia" state that "for geographical and economic reasons" they have "a special interest in the maintenance of peace and good order in certain provinces of Persia adjoining or in the neighborhood of" their frontiers, and that they are "desirous of avoiding all cause of conflict between their respective interests in the above-mentioned provinces of Persia." They thereupon agree in Articles 1, 2, and 3, to limit the spheres of their respective interests in Persia to the

¹ Printed in SUPPLEMENT, I:398.

Persian provinces adjoining their respective frontiers, thus dividing Persia into three spheres of interest: a British sphere, a Russian sphere, and a neutral sphere. Within their respective spheres each party is to be free from competition in seeking economic concessions from the Persian Government. Article 4 provides that the revenues from the Persian customs shall be devoted as previously, certain of them to the amortization and interest of the loans concluded by Persia with the *Banque d'Escompte et des Prêts de Perse* (a bank controlled by Russians and connected with the Russian State Bank), and certain others to the service of the loans concluded by Persia with the *Imperial Bank of Persia*, a British bank incorporated in Great Britain by a royal charter of September 2, 1889. Article 5 contemplates the possible necessity of either government establishing control over the sources of revenue mentioned in Article 4 "in the event of irregularities occurring in the amortization or the payment of the interest of the Persian loans concluded with the *Banque d'Escompte et des Prêts de Perse* and with the *Imperial Bank of Persia*."

The treaty does not in express terms constitute an attack upon the sovereignty of Persia. It is true that a nation possessing a clear consciousness of its sovereign rights would resent such an arbitrary treatment of its economic interests and especially the suggestion of possible interference on the part of foreign governments in the administration of its revenues. As regards the former point, it is no infringement of state sovereignty for two foreign Powers to agree to respect each others' monopoly of economic concessions, though the state might well be alarmed that an economic partition would in due time be stretched into a political partition. The provisions of Article 5 are, however, more significant. How far were the British and Russian Governments concerned in the loans made by the banks controlled by their respective countrymen? The loan made by the British bank in 1892 was guaranteed by the customs of Fars and the Persian Gulf ports. The loan made by the Russian bank in 1900 was guaranteed by all the Persian customs with the exception of those assigned as the guarantee of the loan made by the British bank. These guarantees gave the Russian and British Governments the right to interfere *diplomatically* in favor of the rights of their subjects; they did not give those governments the right to take control on their own initiative of the Persian customs. But Persia was in too disturbed a condition in 1907 either to observe the subtle meaning of the terms of the Anglo-Russian agreement or to enter a protest against them.

The present crisis has the treaty of 1907 for its starting point. The economic interests of Russian subjects and corporations have become the political interests of the Russian Government. The conclusion is inevitable from the pretexts offered by the Russian Government for its action.

On June 13th, Mr. Shuster, an American citizen, assumed charge of the treasury and revenues of Persia. In the statement issued in reply to Russian criticisms, Mr. Shuster says that when he entered upon his duties he found banking deficits amounting to over £100,000, together with an unknown sum outstanding in checks, drafts, etc. These deficits have now been paid, in spite of heavy expenses entailed by the civil war, and there is now a balance of £160,000 in the Persian treasury. What are the charges of the Russian Government against Mr. Shuster?

The law of June 13th invested Mr. Shuster as Treasurer-General with the control of all revenues and the sole power to sign checks on government funds. Mr. Shuster thereupon gave notice that all customs payments should pass through his hands. This action aroused a protest from M. Mornard, a Belgian, who held the office of Director General of Customs, and who had previously drawn checks on the customs funds. In this protest he was supported by the Belgian Legation at Teheran, which announced that it would not permit the Belgian employees of the customs service to serve under Mr. Shuster. The Russian Minister went further and declared that he would introduce Russians into the customs service rather than submit to having Mr. Shuster in control. The two legations even denied the power of the Mejliss (National Council) to pass the law of June 13th. Mr. Shuster satisfied any possible ground of complaint by giving notice to the Imperial Bank and the Banque d'Escompte that no disbursements would be made from the customs receipts until all liens upon them had been paid. M. Mornard was prevailed upon to comply with the law and conceded the justice of the Treasurer-General's demand; but the Russian Minister nevertheless continued to resist Mr. Shuster's authority.

Mr. Shuster's efforts to levy taxes upon the Persian grandees, who as Russian protégés, had hitherto evaded the Persian tax laws, met with steady opposition on the part of Russia. When, however, Mr. Shuster began to appoint Englishmen, familiar with the Persian language, to posts in northern Persia (a measure which he was perfectly justified in taking, though it might have been a more tactful policy had he appointed officers of another nationality) Russia came forward with a veto upon the appointments.

Following this, Mr. Shuster, acting under orders from the Persian cabinet to confiscate the property of Prince Shua-es-Sultaneh, a brother of the deposed Shah, sent a body of gendarmes to the Prince's palace. These gendarmes came into conflict with Russian cossacks who were on guard there. The Russian Government immediately demanded from the Persian Government an apology for the pretended insult, and proceeded to invade the country. The apology was duly made, but in the meantime Mr. Shuster wrote a letter to the *London Times* defending himself against Russian criticisms of his official conduct and making counter-charges against the Russian agents, who had given assistance to the ex-Shah. This letter was made by Russia the pretext for continuing the invasion of Persia, and an ultimatum was issued from St. Petersburg demanding of Persia the immediate dismissal of Mr. Shuster, and a promise that for the future no foreigners should be taken into her service without the consent of the Russian and English Governments.

To sum up the list of charges, Persia has regulated her customs service by placing all of its subordinate offices under her Treasurer-General; she has enforced her taxation laws upon all her subjects, high as well as low; she has appointed tax collectors whom she considered efficient, regardless of their nationality; and lastly she has sent a body of gendarmes to seize the property of a rebellious citizen. These are all acts which by the fundamental principles of international law any sovereign state may do. To regulate without interference its domestic affairs is one of the prime incidents of a state's sovereignty. How can Russia contest the rights of Persia in those matters and yet assert (in the paraphrase of Lord Morley) that she "has no aim which would violate the integrity and independence of Persia." It is difficult to see how the agreement of 1907 between Russia and England can be offered as a justification for the action of the Russian Government, and for the approval by England of its action. There is nothing in that agreement which gives either country any rights as against Persia, and nothing in it which can confer even between the contracting parties any right of political interference in Persia on the part of one of them which the other is bound to support.

One further point deserves comment. On November 9th and 10th Mr. Shuster published in the *London Times* a letter in which he defends certain general statements made some weeks before and gives details to show that Russia's attitude towards Persian reform was one of hostility and interference, and that England was giving her moral support to

Russia in this matter. The letter was translated into Persian and circulated throughout the country — a step for which it is not certain that Mr. Shuster was personally responsible. Conceding that the letter, however true its charges, was a diplomatic blunder, and was in fact calculated to arouse a natural hostility in Persia against Russia, it is again difficult to see how the act can be construed as giving Russia the *casus belli* implied in an ultimatum. The letter was in no way an official document of the Persian Government, and to treat it as such was to take the position that a government is criminally responsible for the unauthorized acts of its agents — a principle clearly not warranted by international law. The Russian Government could properly do no more than treat the letter as it is common in international intercourse to treat published interviews of a similar character, *i. e.*, to protest diplomatically to the government whose officer has committed the act and to demand an official statement that the act was unauthorized. In no case, however, was any greater injury done to Russia by the letter other than that of its putting before the world certain acts of aggression which Russian officials are charged with having committed; such an injury could only give ground for war when a government has, upon investigation, found the charges to be false, and when it has been unable to obtain redress for them through diplomatic channels. As for the condition imposed upon Persia by the Russian ultimatum that Persia shall for the future appoint no foreigners to official posts without the consent of the Russian and British Governments (a condition modified later into a veto upon appointments), the demand put Persia in the position of either entering upon a war, which would be utterly disastrous to undertake, or of accepting terms which are a clear limitation of its sovereignty. The Mejliss has, however, accepted the terms of the ultimatum, and Mr. Shuster has been dismissed from his position as Treasurer General. The situation which results amounts in fact, if not in law, to a joint protectorate on the part of Russia and Great Britain over Persia under protest. *Fuit Ilium.*

MOROCCO

On November 4, 1911, the authorized representatives of France and Germany signed an agreement¹ granting to France the freedom of action in political matters which it has long hoped to obtain in Morocco. The

¹ Printed in SUPPLEMENT, p. 62.

negotiations culminating in the agreement were exceedingly delicate, extending as they did over a long period of time and threatening on various occasions to lead to open rupture; but statesmanship, patience, and an earnest desire to reach a solution of the thorny question, and a willingness to do so at the cost of forbearance and mutual concession, resulted in an agreement satisfactory to the two governments, although critics on both sides of the Rhine have blamed their governments and expressed no little displeasure with some of the terms of the agreement. To a disinterested observer the importance of the transaction lies not so much in the terms of the agreement as in the fact that France and Germany have agreed upon a question of foreign policy which affects their future relations in a coveted portion of territory, and which menaced at times the peace of the world. The result of the agreement, the terms of which will be presently analyzed, is to give France a free hand in Morocco in political matters, while France yields the German contention for economic freedom and equality of treatment. Each of the contending parties has gained its point, and in the agreement there is neither the elation of victory nor the bitterness of defeat. The compromise — for the agreement is a compromise of opposing interests — determines, and it is hoped upon a permanent basis, the relations of each in Morocco without the sacrifice of fundamental positions, and the cloud which for months darkened the political firmament has disappeared without apparent trace of its passage. The statesmen of both countries are therefore to be congratulated upon the satisfactory result of their labors, although it may well be a matter of regret that the agreement affects the future of a state which was not a direct party to the negotiations. In the absence of the official correspondence which passed between France and Germany, it is impossible to trace in detail the various phases of the negotiations which resulted in the agreement of November 4, 1911, but it is possible and sufficient for the present purpose to outline the conditions which suggested the agreement and to forecast in a cautious and tentative manner its probable results.

Bonaparte's Egyptian expedition failed of its immediate purpose to annex Egypt to France, but the scientific results of the expedition attracted the attention of the world. Champollion's discoveries unveiled its mysteries, laid the foundations of Egyptology, and made its absorption by a European Power a question of time. The failure of France to participate in the Egyptian expedition of 1881, which was ostensibly undertaken to restore order, gave England a free hand, and the Sphinx

now looks down upon the Briton firmly seated on the throne of the Pharaohs. The highway to India is practically an English province, and the declaration of April 8, 1904,² by which France agreed not to "obstruct the action of Great Britain in that country by asking that a limit of time be fixed for the British occupation or in any other manner," put an end to French ambitions in that part of the world. But the counter declaration by Great Britain, recognizing France's predominant interest in Morocco and leaving it freedom of action, "provided that such action shall leave intact the rights which Great Britain in virtue of treaties, conventions and usage enjoys in Morocco," opened up a future full of hope in the far West. Egypt was indeed lost, but the dream of a French empire from Tunis to the Atlantic seems the not unnatural consequence of the Anglo-French declaration and the Franco-German agreement of November 4, 1911. In the course of last summer, previous to the negotiation of the agreement, an influential French newspaper exclaimed:

Geography has taken us to the Mediterranean and History has fixed us there. France has taken a preponderant part in the three events which dominate the history of the Latin sea: the unification of Italy, the opening of the Suez Canal, and the Europeanization of North Africa. She is alone in being doubly a Mediterranean Power, for she has a long seaboard on either coast. She can group on the Mediterranean a naval force superior to the entire squadrons of her possible opponents. She is preparing by the negotiations, of which Morocco is at present the subject, a consummation of the plans which she has pursued for eighty years under different régimes and by varied means.

As steps in this development, the government of Charles X, when tottering to its fall, sent an expedition in 1830 to Algiers, and, after years of conflict and difficulty, Algiers is incorporated in the French domain. In 1881 a protectorate was established over Tunis,³ and although this latter territory does not form a department, as in the case of Algiers, it is nevertheless French territory and likely to remain such. The acquisition of Morocco is but the final step in rounding out an African empire, and the establishment of a protectorate is not only foreshadowed by the Franco-German agreement, but was its immediate occasion.

In the earlier decades of the nineteenth century Germany was not in a position to thwart French ambition or to compete for Africa. Prussia

² Printed in SUPPLEMENT, p. 26.

³ For the treaty of May 12, 1881, between France and Tunis, see British and Foreign State Papers, Vol. 72.

had problems of its own nearer home. The exclusion of Austria from Germany proper, as the result of the war of 1866, the unification in 1870 of the German states in an empire dominated by Prussia, and of which its king is emperor, enabled Germany, no longer a geographical expression, to claim its share in the outlying portions of the world and to compete in the markets of the world for commercial supremacy. The wise policy of Bismarck, which made a friend of Austria and encouraged it to seek expansion to the south, relieved the new empire of fear from this quarter. The Franco-Prussian War gave Germany the control of the Rhine, which freed the new empire from dread of invasion from the west. Secure at home and respected abroad, Germany has entered upon a career of commercial expansion, as is evidenced by colonies in Africa, spheres of influence in Asia and a preponderating position in Constantinople. While not adverse to the acquisition of territory, as is shown by the cession to Germany of a portion of the French Congo as the consideration of the Moroccan agreement, German policy rather aims, it would seem, to secure the markets of the world for its industry and commerce. Hence its opposition to any action of France in Morocco which would exclude German products.

During the larger portion of the past eighty years in which France has extended its influence in Africa, Italy was a geographical and an historical expression; for, until the acquisition of Rome the states of Italy lacked cohesion and were not united under a centralized and national government. Italy did indeed object to the establishment of a French protectorate in Tunis, in 1881, but opposition from this quarter was not dangerous. The annexation of Bosnia and Herzegovina by Austria-Hungary in 1908 precluded that country from objecting on high moral grounds to a French protectorate in Morocco, and the ill-concealed ambition of Italy to establish itself firmly in Tripoli and Cyrenaica rendered it improbable that Italy would resent French aggression in Morocco. "A fellow feeling makes us wondrous kind."

Russia is ostensibly the ally of France, and, while it has not lost sight of Constantinople, its Persian projects render the event unlikely that the Czar would oppose French activity in Morocco, which differs in degree, not in kind, from his plans upon Persia. The Anglo-French declaration of April 8, 1904, previously referred to, reinforced by the Secret Articles of the same date,⁴ secured in advance the consent of Great

⁴ Printed in SUPPLEMENT, p. 29.

Britain to action of France in Morocco of a kind calculated to establish a protectorate.

The Anglo-French declaration recognized the interest which Spain has in Morocco "from her geographical position and from her territorial possessions on the Moorish coast of the Mediterranean," and as French ambitions were likely to meet with opposition from Spain, it was provided in Article VIII that the French should come to an understanding with the Spanish Government and that any agreement reached between the two should be communicated to Great Britain. The third of the Secret Articles of the declaration contemplated that Spain should become a party to the agreement, and stipulated that in this event certain advantages should accrue to Spain. Thus:

The two governments agree that a certain extent of Moorish territory adjacent to Melilla, Ceuta, and other *présides* should, whenever the sultan ceases to exercise authority over it, come within the sphere of influence of Spain, and that the administration of the coast from Melilla as far as, but not including, the heights on the right bank of the Sebou shall be entrusted to Spain.

Nevertheless, Spain would previously have to give her formal assent to the provisions of Articles 4 and 7 of the declaration of to-day's date, and undertake to carry them out.

She would also have to undertake not to alienate the whole, or a part, of the territories placed under her authority or in her sphere of influence.

But the non-accession of Spain was not to prevent the agreement between France and Great Britain from going into effect. (Article 4.)

A glance at the map shows the interest that Spain has in Morocco and the advisability, if not the necessity, of consulting it and acting in co-operation with it. The possession of Ceuta, the Alhucema Isles, the Chaferinas, Melilla, Peñón de Velez, etc., makes Spain deeply concerned in any modification of conditions in Morocco, and the traditional friendship which has existed so long between Great Britain and Spain, and the desire of France to be on good terms with its European neighbor, required that Spain be consulted as to prospective changes. Therefore the declaration stipulated that Spain should be consulted and that it be given an opportunity to adhere to the treaty. In accordance with this understanding the declaration was communicated to Spain by France, and on October 3, 1904,⁵ Spain adhered to the agreement. The adherence was preceded by a treaty of the same date defining the interests of France and Spain in Morocco, but the text of this treaty was not made

⁵ See declaration of adherence printed in SUPPLEMENT, p. 30.

public at the time.⁶ The agreement of November 4, 1911, will necessitate a readjustment of French and Spanish claims in Morocco, and negotiations are in progress to adjust outstanding claims inconsistent with the terms of the Franco-German agreement.

The Anglo-French declaration of April 8, 1904, may be considered as the starting point of the negotiations leading to the Franco-German agreement under discussion. The declaration seemed to have the approval of the Powers, but the events of 1905 showed that France, Great Britain and Spain had made a serious tactical blunder in not consulting Germany. The visit to Morocco of the German Emperor, who landed at Tangier on March 31, 1905, caused uneasiness, for he is reported to have declared that he had come "to enforce the sovereignty of the Sultan, the integrity of Morocco, and the equality of commercial and economic interests." However that may be, the Sultan rejected the reforms proposed by France, and, at the suggestion of Germany, issued an invitation to the Powers for a conference in order to consider the question. It is well known that M. Delcassé, the French Minister of Foreign Affairs, opposed the idea of a conference, but Germany insisted, Delcassé resigned, and France yielded. The Powers thereupon met in conference at Algeciras, on January 16, 1906, and remained in session until April 7th, when the Act of Algeciras was signed by the delegates.⁷ Without analyzing this important convention, it is sufficient to say that it recognized the dominant interest of France and Spain in Morocco, safeguarded the principle of economic equality, and negated the ambition of France to establish, either in law or in fact, a protectorate. The Sultan accepted the convention on June 18th, and the ratifications of the other Powers were deposited at the Spanish Foreign Office on December 31, 1906. The period following the conference was unfortunately marked by domestic troubles, the armed intervention of France, the deposition of the Sultan, and the accession of his brother, Hafid. The desire of Germany for the immediate recognition of Hafid took expression in the form of a circular to the Powers, dated September 2, 1908, which caused anxiety in diplomatic circles, and France and Spain insisted that Hafid's recognition should be conditioned upon guarantees from him that the Act of Algeciras would be respected. The views of these two govern-

⁶ This treaty, as well as other relevant documents, will be published in a subsequent issue when France and Spain have reached an agreement upon the Moroccan question.

⁷ For the text of this act, see SUPPLEMENT for January, 1907 (Vol. I), p. 47.

ments prevailed, the guarantees were given, and Hafid was recognized as Sultan in the beginning of 1909.⁸

From this brief account, it is evident that the intervention of Germany blocked the action of France contemplated by the parties to the declaration of April 8, 1904, although Germany did not succeed in discouraging France from continuing its efforts. The success of German diplomacy coupled, perhaps, with the feeling that French preponderance was inevitable, led Germany to come to an agreement with France, signed on February 9, 1909,⁹ in which Germany stated that its interests in Morocco were economic, that it recognized that the political interests of France were closely bound up with the maintenance of order and domestic peace in Morocco, and that it would not oppose obstacles to these interests. At the same time France declared itself as attached to the maintenance of the integrity and independence of Morocco, as determined to safeguard economic equality, and as determined not to interfere with the commercial and industrial interests of Germany. The literal interpretation of this agreement would have postponed indefinitely the realization of French hopes and ambitions in Morocco, but its negotiation served to relieve the tension which existed between the two countries. Disorder and lawlessness continued to mark the Sultan's administration, and in 1909 Spain sent a force of fifty thousand men to Morocco, defeated Hafid's army, and secured a treaty favorable to its rights and pretensions.¹⁰ The resources of the empire had been wasted by misgovernment and foreign complications. Money was needed to meet claims of European creditors; most of this money was advanced by France, which took occasion to negotiate an arrangement to settle pending difficulties between the two countries.¹¹

In view of the chronic disorder obtaining in Morocco, it can not be doubted that the establishment of stable government would be not merely in the best interests of the Powers, but of inestimable service to the Moroccans, who are plundered by officials, forced to take sides with various pretenders, and exposed to the armed intervention of their more powerful neighbors. It may be questioned whether an adequate native government could be easily established. A joint protectorate of the

⁸ See documents concerning the recognition of Mulai Hafid, SUPPLEMENT, Vol. III (1909), p. 101.

⁹ Printed in SUPPLEMENT, p. 31.

¹⁰ For text of this treaty, see SUPPLEMENT, p. 54.

¹¹ For text of this document, see SUPPLEMENT, p. 43.

Powers would be possible, but the verdict of history is against joint protectorates. The determination of France to acquire political control in Morocco is outspoken and of long standing, and at last Germany has yielded to French insistence, or at least has promised in the agreement of November 4, 1911, not to interfere, so far as it is concerned, with the political activity of France, provided that the principle of economic equality be accepted and enforced by France. When it is stated that the accord of February 9, 1909, between France and Germany, required thirty-two days for its conclusion, we are prepared to understand why the negotiations leading to the recent agreement were so prolonged and difficult. The fear that concession should be construed as a sign of weakness complicated a situation already sufficiently complex. Germany desired to come to direct terms with France without consulting other Powers; but the interest of Great Britain in the settlement could not be overlooked, in view of the declaration of April 8, 1904, by which Great Britain pledged to France at least its moral support in the realization of the latter's policy. The result was that relations between Germany and Great Britain became embittered, and, during the month of July of the past year, threatened to involve the two countries in war. The awful consequences which would result from a struggle between these two countries, the loss of life, and the economic ruin which it would entail seem to have given the parties pause before the final step was taken. Germany yielded to the representations of France, and consented to a recognition of the "right" of France, so far as Germany was concerned, to take political action in Morocco, provided economic equality was preserved. As a consideration for Germany's acquiescence, France bound itself to cede certain portions of the French Congo to Germany.¹²

The agreement of November 4, 1911, between France and Germany, abrogates by express terms any and all existing French and German conventions, treaties, or regulations in contravention of or inconsistent with its terms (Article 13). As the Madrid Convention of 1881 stands in the way, France and Germany agree to induce the signatory Powers to modify it (Article 12); and in like manner the Algeiras Act, which is an international convention, signed by twelve Powers, is to be communicated to them by France and Germany who pledge their mutual endeavors to obtain approval of the present agreement (Article 14). There may be considerable delay in securing the approval of the various

¹² For this part of the Moroccan agreement, see SUPPLEMENT, p. 4.

Powers to the agreement, and negotiations with Spain, by reason of its peculiar interests, may require much time; but given European conditions and the willingness of the great Powers, as evidenced by their history, to sacrifice the independence of a country in which they are not specially interested, it appears probable that their approval will be obtained without serious difficulty.

It may seem strange that two of the most advanced and most highly civilized Powers of the world, ancient or modern, should enter into an agreement affecting a third country (Morocco), which was not a party to the negotiations, for there is no evidence in the treaty that Morocco has agreed in advance to its terms. It will, it is believed, be persuaded or forced to yield: *voluntas principis facit jus*.

THE PENDING TREATY OF ARBITRATION BETWEEN THE UNITED STATES
AND GREAT BRITAIN *

On the 3d day of August, 1911, the pending treaty of arbitration between the United States and Great Britain¹ was signed by Secretary Knox on behalf of the United States, and by Ambassador Bryce on behalf of Great Britain, and the following day it was sent to the Senate for its advice and consent to its ratification. There has been comparatively little difference of opinion as to the advisability of negotiating treaties of arbitration which will bind the respective nations to submit their differences broadly and generally to this peaceful method of settling international disputes, and it may be said that public opinion in each of the countries is prepared for the widest possible extension and application of the principle of arbitration to any differences which may unfortunately arise between them and which the ordinary channels of diplomacy shall have failed to adjust.

While the general principle is thus admitted by the respective governments and their peoples, details of a domestic nature have given rise to much discussion and prevented prompt approval of certain provisions of the treaty. It is thought advisable to point out in this place the general purposes of the treaty, the means by which they are sought to be made effective, and to mention the points of controversy impartially by argu-

* In this comment the pending treaty between the United States and Great Britain is considered without reference to the French treaty, which is, however, identical in terms.

¹ Printed in the October, 1911, SUPPLEMENT, p. 253.

ments drawn, on the one hand, from the opponents of their ratification in the form as submitted to the Senate, and, on the other hand, from the partisans of their ratification in that form, leaving to signed articles expressions of individual assent to, or of dissent from, some of the terms of the treaties. For this purpose notice will be taken of the majority report of the Foreign Relations Committee of the Senate objecting to certain provisions of the treaties, of the minority report of the same body advocating their approval with or without an interpretation of their terms, and of the authoritative interpretation of the treaties made by Secretary of State Knox, in an elaborate and carefully prepared address before the American Society for Judicial Settlement of International Disputes. A few words may properly be said about the genesis of the treaties before quoting their terms and passing to the arguments of opponent or partisan.

At a meeting of the American Society for the Judicial Settlement of International Disputes, held at Washington on December 17, 1910, President Taft said:

What teaches nations and peoples the possibility of permanent peace is the actual settlement of controversies by courts of arbitration. The settlement of the Alabama controversy by the Geneva arbitration, the settlement of the seals controversy by the Paris Tribunal, and the settlement of the Newfoundland Fisheries controversy by the Hague Tribunal are three great substantial steps toward permanent peace, three facts accomplished that have done more for the cause than anything else in history.

With reference to the submission of controversies to courts of arbitration, in order that disputes between nations might be settled by judicial means, he said:

If now we can negotiate and put through a positive agreement with some great nation to abide the adjudication of an international arbitral court in every issue which can not be settled by negotiation, no matter what it involves, whether honor, territory or money, we shall have made a long step forward by demonstrating that it is possible for two nations at least to establish as between them the same system of due process of law that exists between individuals under a government.

Great Britain thereupon proposed that a general treaty of arbitration calculated to give effect to this very important announcement of the President, be negotiated between the United States and Great Britain, and as a consequence of prolonged consideration and mature reflection, the pending treaty was concluded.

Arbitration treaties were concluded in 1908 between the United States, Great Britain and France, but they reserved from the scope of arbitration questions of independence, vital interests and honor, and the preamble to the present treaty was negotiated in order to extend the scope and obligations of those treaties "so as to exclude certain expressions" contained therein. The high contracting parties therefore agree in the first article of the pending treaty that

all differences hereafter arising between the high contracting parties, which it has not been possible to adjust by diplomacy, relating to international matters in which the high contracting parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the Permanent Court of Arbitration, established at The Hague by the Convention of October 18, 1907, or to some other arbitral tribunal, as shall be decided in each case by special agreement, which special agreement shall provide for the organization of such tribunal if necessary, to define the scope of the powers of the arbitrators, the question or questions at issue, and settle the terms of reference and the procedure thereunder.

The concluding paragraph of this article contemplated a special agreement in each case "to be made on the part of the United States by the President of the United States, by and with the advice and consent of the Senate thereof," and that "such agreement shall be binding when confirmed by the two governments by an exchange of notes." The treaty further provided for

a joint high commission of inquiry to which, upon the request of either party, shall be referred for impartial and conscientious investigation, any controversy between the parties within the scope of Article I, before such controversy has been submitted to arbitration, and also any other controversy hereafter arising between them even if they are not agreed that it falls within the scope of Article I; provided, however, that such reference may be postponed until the expiration of one year after the date of the formal request therefor, in order to afford an opportunity for diplomatic discussion and adjustment of the questions in controversy, if either party desires such postponement.

The commission thus referred to is to be constituted in the following manner:

Each of the high contracting parties shall designate three of its nationals to act as members of the commission of inquiry for the purposes of such reference; or the commission may be otherwise constituted in any particular case by the terms of reference, the membership of the commission, and the terms of reference to be determined in each case by an exchange of notes.

Article III, which has given rise to serious controversy, is as follows:

The joint high commission of inquiry, instituted in each case as provided for in Article II, is authorized to examine into and report upon the particular questions or matters referred to it, for the purpose of facilitating the solution of disputes by elucidating the facts, and to define the issues presented by such questions, and also to include in its report such recommendations and conclusions as may be appropriate.

The reports of the commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or on the law and shall in no way have the character of an arbitral award.

It is further agreed, however, that in cases in which the parties disagree as to whether or not a difference is subject to arbitration under Article I of this treaty, that question shall be submitted to the joint high commission of inquiry; and if all or all but one of the members of the commission agree and report that such difference is within the scope of Article I, it shall be referred to arbitration in accordance with the provisions of this treaty.

An examination of the essential terms of these three articles discloses the fact that all questions "justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity," shall be arbitrated, and that if a dispute of a justiciable nature arises between the countries it shall be referred to the commission of inquiry "for an impartial and conscientious investigation," before it shall be submitted to arbitration, in the hope that such impartial and conscientious investigation may settle the question without a resort to arbitration, which is, at present, a costly and time-consuming procedure. In like manner, any other controversy, although it be not justiciable and therefore falls outside the scope of Article I, shall be submitted to the commission in the belief that an impartial and conscientious investigation will suggest a peaceful settlement of the controversy. It is, however, expressly stipulated, as appears from Article III, which has been quoted, that "the reports of the commission shall not be regarded as decisions of the questions or matters submitted, either on the facts or on the law, and shall in no way have the character of an arbitral award." The negotiators were evidently of the opinion "that an impartial and conscientious investigation" of justiciable and other questions might, in many cases, avoid the resort to arbitration. It may, however, happen that one country may maintain that a question falls within the obligation of Article I, that is to say, that it is justiciable, whereas the other country may insist that it is not justiciable. To break the deadlock the concluding paragraph of Article III vests the commission with the power

of deciding whether or not the question is arbitrable under the treaty, and provides that if all but one of the members of the commission agree and report that such difference is within the scope of Article I it shall be referred to arbitration. If, therefore, the six commissioners agree, or five of them agree, that the difference is within the scope of Article I, it is justiciable and shall be referred to arbitration, but the arbitration in this case requires, by express terms of Article I, a special agreement, and the special agreement can only be concluded by "the President of the United States, by and with the advice and consent of the Senate," and the special agreement shall only become binding after the approval by the Senate, which approval is to be confirmed by an exchange of notes between the two governments.

The majority report of the Senate committee accepts apparently the principle of arbitration, and the committee is equally desirous, with the President, to enlarge its scope. Thus:

The Senate of the United States is as earnestly and heartily in favor of peace and of the promotion of universal peace by arbitration as any body of men, official or unofficial, anywhere in the world, or as anyone concerned in the negotiation of arbitration treaties. The Senate today is heartily in favor, in the opinion of the committee, of enlarging to the utmost practicable limit the scope of general arbitration treaties. The committee itself, and in the opinion of the committee, the Senate also, has no desire to contract the ample boundaries set to arbitration in the first article.

After this general statement, the majority report, recommending the treaties with the omission of the last paragraph of the third article, and the softening of the obligation of the first article by the use of the word "may" for "shall," objects to the use in the first article of the expression "law or equity," as a test of the justiciable nature of the controversy:

In England and the United States, and wherever the principles of the common law obtain, the words "law or equity" have an exact and technical significance, but that legal system exists nowhere else and does not exist in France, with which country one of these treaties is made. We are obliged, therefore, to construe the word "equity" in its broad and universal acceptance as that which is "equally right or just to all concerned: as the application of the dictates of good conscience to the settlement of controversies." It will be seen, therefore, that there is little or no limit to the questions which might be brought within this article, provided the two contracting parties consider them justiciable.

The chief objection of the Senate, however, is the power vested in the commission to decide whether or not the question is justiciable, and it

declares that the acceptance of the treaty with this clause would constitute a delegation of its treaty-making power:

The last clause of Article III, therefore, the Committee on Foreign Relations advises the Senate to strike from the treaty and recommends an amendment to that effect. This recommendation is made because there can be no question that through the machinery of the joint commission, as provided in Articles II and III, and with the last clause of Article III included, the Senate is deprived of its constitutional power to pass upon all questions involved in any treaty submitted to it in accordance with the Constitution. The committee believes that it would be a violation of the Constitution of the United States to confer upon an outside commission powers which, under the Constitution, devolve upon the Senate. It seems to the committee that the Senate has no more right to delegate its share of the treaty-making power than Congress has to delegate the legislative power. The Constitution provides that before a treaty can be ratified and become the supreme law of the land it shall receive the consent of two-thirds of the Senators present. This necessarily means that each and every part of the treaty must receive the consent of two-thirds of the Senate. It can not possibly mean that only a part of the provisions shall receive the consent of the Senate. To take away from the Senate the determination of the most important question in a proposed treaty of arbitration is necessarily in violation of the treaty provisions of the Constitution. The most vital question in every proposed arbitration is whether the difference is arbitrable. For instance, if another nation should do something to which we object under the Monroe Doctrine and the validity of our objection should be challenged and an arbitration should be demanded by that other nation, the vital point would be whether our right to insist upon the Monroe Doctrine was subject to arbitration, and if the third clause of Article III remains in the treaty the Senate could be debarred from passing upon that question.

One of the first sovereign rights is the power to determine who shall come into the country and under what conditions. No nation which is not either tributary or subject, would permit any other nation to compel it to receive the citizens or subjects of that other nation. If our right to exclude certain classes of immigrants were challenged, the question could be forced before a joint commission, and if that commission decided that the question was arbitrable the Senate would have no power to reject the special agreement for the arbitration of that subject on the ground that it was not a question for arbitration within the contemplation of Article I. In the same way our territorial integrity, the rights of each State, and of the United States to their territory might be forced before a joint commission, and under Article III, in certain contingencies, we should have no power to prevent our title to the land we inhabit from being tried before a court of arbitration. To-day no nation on earth would think of raising these questions with the United States, and the same is true of other questions, which will readily occur to everybody. But if we accept this treaty with the third clause of Article III included we invite other nations to raise these very questions and to endeavor to enforce them before an arbitral tribunal. Such an invitation would be a breeder of war and not of peace, and would

rouse a series of disputes, now happily and entirely at rest, into malign and dangerous activity. To issue such an invitation is not, in the opinion of the committee, the way to promote that universal peace which we all most earnestly desire.

With the substitution of "may" for "shall" in the first article, and with the omission of the last paragraph of Article III, the majority report recommends the approval of the treaties.

The minority report, presented by Senator Root, in which Senators Cullom and Burton joined, thus answers the objection raised to the preliminary determination of the justiciable nature of the question:

The pending treaties also provide that, if the parties disagree as to whether any particular case comes within the description of the class which we have agreed to arbitrate, the question whether that case is one of the cases described shall be submitted to the arbitral decision of a joint commission.

We see no obstacle to the submission of such a question to decision, just as any other question of fact, of mixed fact and law, may be submitted to decision. Such a submission is not delegating to a commission power to say what shall be arbitrated; it is merely empowering the commission to find whether the particular case is one that the President and Senate have said shall be arbitrated.

Provisions of this kind are very common in our statutes. For example when Congress provides that a duty shall be imposed upon imports of one kind and not upon imports of another kind some officer has to decide whether goods which are imported come within the dutiable class or not. No one claims that the power to make such a decision involves a delegation to collectors of customs of legislative power to say what goods shall be dutiable.

Replying to the argument that questions of national policy and conduct might be submitted to arbitration by the treaty as worded, the minority report says:

It is true that there are some questions of national policy and conduct which no nation can submit to the decision of anyone else, just as there are some questions of personal conduct which every man must decide for himself. The undoubted purpose of the first article of these treaties is to exclude such questions from arbitration as nonjusticiable.

If there is danger of misunderstanding as to whether such questions are indeed effectively excluded by the terms of the first article, such a danger, of course, should be prevented. No one questions the importance of having the line of demarcation between what is and what is not to be arbitrated clearly understood and free from misunderstanding; for nothing could be worse than to make a treaty for arbitration and then to have either party charged by the other party with violating it.

The real objection to the clause which commits to the proposed joint commission questions whether particular controversies are arbitrable is not that the

commission will determine whether the particular case comes within a known line, but that the commission, under the general language of the first article, may draw the line to suit themselves instead of observing a line drawn by the treaty-making power. If we thought this could not be avoided without amending the treaty, we would vote for the amendment to strike out the last clause of Article III, for it is clearly the duty of the treaty-making power, including the Senate, as well as the President, to draw that line, and that duty can not be delegated to a commission.

We do not think, however, that any such result is necessary. It certainly is not intended by the treaty; and it seems that it can be effectively prevented, without amending the treaty by following a practice for which there is abundant precedent, and making the construction of the treaty certain by a clause in the resolution of consent to ratification. Such a clause being included in the formal ratification will advise the other party of our construction, and being accepted will remain of record as the true construction.

Such a clause may well be, in substance, as follows:

The Senate advises and consents to the ratification of the said treaty with the understanding, to be made a part of such ratification, that the treaty does not authorize the submission to arbitration of any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, or other purely governmental policy.

The minority report proposed to advise consent to the ratification of the treaties without amending them, but by adding to the resolution of advice and consent the following clause:

Resolved further, That the Senate advises and consents to the ratification of the said treaty with the understanding, to be made a part of such ratification, that the treaty does not authorize the submission to arbitration of any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, or other purely governmental policy.

Senator Burton, who concurred in the minority report, made a supplemental statement of his views regarding the intentions of the minority report, and expressed himself in favor of the ratification of the treaties as submitted.

Senator Bacon proposed to amend Mr. Root's resolution to read as follows:

Resolved further, That the Senate advises and consents to the ratification of the said treaty with the understanding, to be made a part of such ratification, that the treaty does not authorize the submission to arbitration of any question which affects the admission of aliens into the United States, or the admission of aliens to the educational institutions of the several States, or the territorial integrity of the several States or of the United States, or concerning the ques-

tion of the alleged indebtedness or moneyed obligation of any State of the United States, or any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine, or other purely governmental policy.

He also proposed the following additional resolution to define and state clearly the power which, in his opinion, the Senate constitutionally possesses:

Resolved further, That the Senate advises and consents to the ratification of the treaty with the understanding, to be made a part of such ratification, that the treaty does not purport or intend that there shall in any case be denied to the Senate of the United States the full exercise of all the powers and duties conferred upon it by the Constitution of the United States in advising and consenting to the making of treaties and as to each and every part of the same and as to each and every question entering therein; and that nothing in said treaty shall be construed to impose any obligation, legal or moral, upon the Senate to waive its constitutional authority and duty to consider and determine each and every question entering into treaties proposed or submitted in pursuance thereof, including the question whether the matters in difference are arbitrable.

Secretary Knox's address before the Society for the Judicial Settlement of International Disputes, delivered at Cincinnati, on November 8, 1911, may be taken as the clearest and most authoritative statement of the views of the administration. He calls attention to the fact that the Senate and the Executive are in favor of arbitration and passes to a consideration of the differences which have unfortunately arisen between these two branches of the treaty-making power. He assumes that the treaty-making power "may constitutionally enter into a treaty to arbitrate all differences" and that the agreement to arbitrate the question as to whether the specified differences are arbitrable within the terms of such treaty is a less comprehensive exercise of the treaty-making power than would be the agreement to arbitrate all differences. He thus states the point of difference between the Senate and the Executive:

The question, therefore, is one of expediency and not of power, and, stated in its simplest form and in the sense and to the extent that it is now involved, is this: Is it wise as a matter of expediency to provide that in case the executive branches of two governments fail to agree as to whether a specific difference is within the terms of Article I, that question should be referred to a commission for decision, so that if it is decided to be within the terms of the treaty, the special agreement to arbitrate should be prepared and sent to the Senate for its approval, as it would have been if no question as to its arbitrability had arisen?

He then says:

Every agreement to arbitrate must go to the Senate for its approval. There can be no arbitration without its approval. An agreement to arbitrate goes to the Senate for its approval either because the executive branches of the two countries concerned in the difference agree that the difference is one for arbitration or because, failing so to agree, the commission of inquiry report that it is such a difference.

How can the Senate's power over the agreement be less if it goes to the Senate after the commission's report that it presents an arbitrable question than if it had gone there because of the opinion of the executive branches of both governments to the same effect?

If the two governments agree that the difference is arbitrable they make an agreement to arbitrate it and it is sent to the Senate for its approval. If the two governments can not agree that the difference is arbitrable that ends the matter until the commission reports, and if its report is that the difference is arbitrable an agreement is made to arbitrate it and the agreement is sent to the Senate for approval just as if no such question had been raised, and the Senate deals with it with unimpaired powers.

In order to allay any fear that the members of the commission may not possess the full confidence of the Senate, Secretary Knox states that:

The President is willing, and always has been willing, and the Senate may so provide, that they shall be nominated by the President and confirmed by the Senate.

Mr. Knox then takes up *seriatim* certain questions of policy, as distinct from questions of law, which could not properly be arbitrated under the terms of the treaty, namely, questions concerning the Monroe Doctrine, the right to exclude immigrants, the question of territorial integrity, and states that:

If you examine them and apply the test of the first article of the treaties to each, it will demonstrate their non-inclusion in the class of questions it is proposed to arbitrate. They are matters of such universally conceded domestic concern that it is difficult to imagine other nations claiming rights in respect to them or to find danger to them in treaties which provide for arbitration only where international rights are involved.

The Secretary then states that one of the great advantages of the treaties "is the substitution of a carefully defined jurisdiction for the vague and indefinite terms of existing treaties, a jurisdiction under which our honor or vital interests can not be imperiled, unless, indeed, we assert them against another nation's rights."

He concludes his address with the following apt quotation from Presi-

dent McKinley's message advocating the favorable consideration of the Olney-Pauncefote treaty of arbitration, concluded in 1897:

Since this treaty is clearly the result of our own initiative, since it has been recognized as the leading feature of our foreign policy throughout our entire national history — the adjustment of difficulties by judicial methods rather than by force of arms — and since it presents to the world the glorious example of reason and peace, not passion and war, controlling the relations between two of the greatest nations of the world, an example certain to be followed by others, I respectfully urge the early action of the Senate thereon, not merely as a matter of policy, but as a duty to mankind. The importance and moral influence of the ratification of such a treaty can hardly be overestimated in the cause of advancing civilization. It may well engage the best thought of the statesmen and people of every country, and I can not but consider it fortunate that it was reserved to the United States to have the leadership in so grand a work.

No action was taken upon the treaties at the last session of the Senate. During the succeeding months there was much discussion of the questions involved. On January 11th of the present session Senator Lodge, of the Senate committee, proposed the following resolution:

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of a treaty signed by the plenipotentiaries of the United States and Great Britain on August third, nineteen hundred and eleven, extending the scope and obligation of the policy of arbitration adopted in the present arbitration treaty on April fourth, nineteen hundred and eight, between the two countries, so as to exclude certain exceptions contained in that treaty, and to provide means for the peaceful solution of all questions of difference which it shall be found impossible in future to settle by diplomacy.

Resolved, further, That the Senate advise and consent to the ratification of the treaty with the understanding, to be made a part of such ratification, that any joint high commission of inquiry to which shall be referred the question as to whether or not a difference is subject to arbitration under Article I of the treaty, as provided by Article III thereof, the American members of such commission shall be appointed by the President subject to the advice and consent of the Senate, and with the further understanding that the reservation in Article I of the treaty that the special agreement in each case shall be made by the President by and with the advice and consent of the Senate means the concurrence of the Senate in the full exercise of its constitutional powers in respect to every special agreement whether submitted to the Senate as the result of the report of a joint high commission of inquiry under Article III or otherwise.

Thus the matter stands as the JOURNAL goes to press. It is to be hoped that an acceptable solution of this domestic difficulty may be reached so that the cause of arbitration may not seem to be compromised in the minds of the enlightened both at home and abroad.

WAS THE AWARD IN THE NORTH ATLANTIC FISHERIES CASE A COMPROMISE?

In the July, 1911, number of the JOURNAL (Vol. 5, p. 725), an editorial was printed under the heading "Statement by the President of the Tribunal that the North Atlantic Fisheries Award was a Compromise," the subject of which was a statement, made by the president of the tribunal, Dr. Lammasch, in an article published in *Das Recht*, that the award in the fisheries arbitration "contained elements of a compromise for which, however, the tribunal had received special and exceptional authorization." The editorial briefly reviewed the treaties relating to and providing for the arbitration and concluded that compromise seemed to have been excluded and that we were unable to discover the special and exceptional authorization mentioned by the president as justifying a compromise.

We are now in receipt of a communication from Dr. Lammasch in which he explains what was meant by his statement referred to and gives the reasons upon which it was based. At the request of Dr. Lammasch, and in order that our readers may have the benefit of the distinguished arbitrator's views, his communication is printed in full:

THE AMERICAN JOURNAL OF INTERNATIONAL LAW did me the honour to quote some part of a little article I had published in a German law review concerning the award of the arbitral tribunal instituted at The Hague to decide the controversies between the United States of America and Great Britain concerning the North Atlantic fisheries, of which tribunal I had been the president. I had said in that article that the sentence of this tribunal "contained elements of a compromise, for which, however, the tribunal had received special and exceptional authorization." In saying so, I alluded of course to the *recommendations* which the tribunal had proposed to both governments in virtue of Article IV of the special agreement concluded between the litigating Powers.

One of the questions to be decided by the arbitral tribunal was: 5th. From where must be measured the "three marine miles of any of the coasts, *bays*, creeks or harbours" referred to in the said article of the treaty of 1818? In regard to this question the difference was that Great Britain claimed that the renunciation of the United States applied to all bays generally, whereas the United States contended that it applied only to bays of a certain class or condition. The majority of the tribunal, including the two national arbitrators, Mr. Justice Gray and Sir Charles Fitzpatrick, were of opinion that the treaty used the general term *bays* "without qualification" and that therefore

These words of the treaty must be interpreted in a general sense as applying to every bay on the coast in question that might be reasonably supposed to have been considered as a bay by the negotiators of the treaty under the general conditions then prevailing.

The negotiators of the treaty of 1818 did probably not trouble themselves with subtle theories concerning the notion of "bays," they most probably thought that everybody would know what was a bay. In this popular sense the term must be interpreted in the treaty. The interpretation must take into account all the individual circumstances which for any one of the different bays are to be appreciated, the relation of its width to the length of penetration inland, the possibility and the necessity of its being defended by the state in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general.

For these reasons the tribunal decided that in case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. The majority of the tribunal developed the reasons for this award in a very detailed statement containing not less than 21 items. Only one of the arbitrators, Mr. Drago, dissented from this part of the sentence, without nevertheless exactly stating in his opinion filed at the International Bureau of the Permanent Court of Arbitration what sense he attributed to the word "bay" in the treaty of 1818. The tribunal could not overlook that the answer given to Question V "*although correct in principle and the only one possible in view of the want of sufficient basis for a more concrete answer.*" was "not entirely satisfactory as to its practical applicability and that it leaves room for doubts and differences in practice." The tribunal foresaw that there would arise in future questions regarding the *exercise of the liberty of American citizens to fish outside the limits indicated by the treaty and the award*. For the purpose of determining these questions in accordance with the *principles* laid down in the award, the tribunal made use of the special and exceptional authorization which had been given to it by Article IV of the agreement of April 4, 1908.

Article IV reads as follows:

The Tribunal shall recommend for the consideration of the high contracting parties *rules and a method of procedure* under which all questions which may arise in the future regarding the *exercise of the liberties* above referred to may be determined in accordance with the *principles* laid down in the award.

Pursuant to this article, the tribunal recommended for the consideration and acceptance of the high contracting parties some *rules* and a *method of procedure* for determining the limits of the bays enumerated.

The starting point of these recommendations were the considerations that in subsequent treaties with France, with the North German Confederation and the German Empire, and likewise in the North Sea Convention, Great Britain had adopted for similar cases the rule that only bays of ten miles width should be considered as those wherein the fishing is reserved to nationals, and that in the course of the negotiations between Great Britain and the United States a similar rule had been on various occasions proposed and adopted by Great Britain in instructions to the naval officers stationed on these coasts.

Though these considerations, in the opinion of the majority of the tribunal, were not sufficient, as they seemed to Dr. Drago, to constitute this a principle of international law, it nevertheless seemed reasonable to them to recommend this rule with certain exceptions, especially since this rule with such exceptions had already formed the basis of an agreement between the two Powers. *These recommendations were the result of a compromise and to that compromise I recall to have alluded with the words which the editor of this JOURNAL did me the honour to quote from my article in the *Recht*.*

I think it necessary to make this statement with reference to what I meant by the words in question, because not only the distinguished editor of the JOURNAL but also two other prominent American lawyers, with whom I had the pleasure to collaborate at The Hague, Mr. Robert Lansing, in the *University of Pennsylvania Law Review* (1910, p. 143), and Mr. Wm. Cullen Dennis in the *Columbia Law Review* (1911, p. 499), seem to have interpreted my article in the *Recht* in a sense which I must most respectfully decline. I did not state that the sentence in the fisheries cases was a compromise, but that it did contain elements of a compromise.

DR. LAMMASCH.

NAVAL PRIZE BILL AND THE DECLARATION OF LONDON.

The rejection by the House of Lords on December 15th of the Naval Prize Bill¹ carries with it the repudiation of the International Prize Court, created by the Second Hague Conference. The bill amends the English law relating to naval prizes of war in such a way as to enable the Hague Convention to be carried into effect, while Article 28 of the bill provides that British courts shall enforce the decrees of the International Prize Court. It is evident from the attacks upon the bill, both in the press and in the House of Commons, that the real reason for the opposition to the International Prize Court was the fact that the Declaration

¹ 1 and 2, George V.

of London lay behind it — that the fate of the former decided the fate of the latter.

On February 27, 1908, the chief naval Powers were invited by the British Government to meet in conference in order to reach an agreement as to just what were the "generally recognized rules" of international law, which by Article VII of the convention establishing the International Prize Court, were to be applied by that tribunal in the decision of cases coming before it. The conference met on December 4, 1908, and on February 26, 1909, published the results of its deliberations, which became known as the Declaration of London.² The Declaration met from the start with the most violent opposition in England: the greater part of the press denounced it, and a petition to the King, issued by the Imperial Maritime League, asking that ratifications be delayed, was signed by an extended list of commercial associations, mayors, members of the House of Lords, general officers, and other public officials. As many as 138 officers of flag rank addressed to the Prime Minister a public letter of protest against the Declaration.

What is at the bottom of this repudiation of an agreement which was formulated at a conference at which Great Britain was represented by chosen delegates under instruction from their governments? It is safe to say that the undercurrent of uneasiness existing in the public mind over the possibility of war with Germany made it almost certain in advance that the Declaration would not be subjected to calm and dispassionate public criticism before being ratified or rejected. The constant reference on the part of critics to a future war in which the island might be reduced to starvation in consequence of food-stuffs being placed on the list of conditional contraband, indicates clearly that the Declaration was being tested with reference to a war in which the existence of England would be at stake. Now it is evident that when judged from such a point of view a definite statement of rights is much less satisfactory to the public mind than a vague conception, however unfounded, of what those rights should be; — the imagination prefers to enlarge upon the latter rather than face the facts contained in the former.

The Declaration may be considered in this connection under two separate headings: what change does it make in the position of Great Britain as a belligerent, and what change does it make in her position as a neutral? It is important to consider the two points separately, since

² Printed in SUPPLEMENT, 3:179.

it is evident that if a given rule adds to the rights of a nation when belligerent it will take away from the rights of a nation when neutral. An exception, however, must be noted with respect to conditional contraband, in which case, owing to the peculiar situation of England as an island, she has more to gain as a belligerent in leaving neutral trade in food-stuffs unhampered than in restricting it. Now, while it is chiefly from the point of view of England as a belligerent that the Declaration has been discussed, many of the critics of the Declaration seem to think that England should not suffer as a neutral where she gained as a belligerent. Strangely enough, the fact that Great Britain's earliest interest in the International Court of Prize was the desire to protect her commerce as a neutral was overlooked in the discussion of the bill.

As a belligerent Great Britain gains in having what were practically her own views as to blockade adopted. The Continental doctrine was that blockade must be limited within a line drawn around the blockaded port, and that until a vessel attempted to break through that line it could not be captured. France and Italy even held that a ship could not be captured until it had been visited and formally notified of the existence of the blockade, thus making possible a first attempt to break through the blockade with impunity. The Declaration allows the blockading fleet to enforce the blockade throughout the *area of operations* — a rule which, though theoretically narrower than the English claim, is practically the law applied by her admiralty courts. On the question of contraband the chief point of opposition to the Declaration was that food-stuffs were classed as conditional contraband, that is, as subject to capture when destined for the use of the armed forces or government departments of the enemy state. It was on this point that the cry arose that the Declaration endangered the food supplies of the country in time of war, the assertion being made that any port of the Island Kingdom might be regarded as "serving as a base for the armed forces of the enemy." In answer to this it may be said that if England is to depend upon neutral vessels for her food supplies her position will already have become hopeless. But apart from that, it is no loss to England to have food-stuffs declared *conditional* contraband (however liberally that term may be construed) when they might in fact be declared *absolute* contraband, as they were by France in 1885 (a position of which Germany approved), and by Russia in 1904. As Sir Edward Grey said in his speech of December 8 in the House of Commons:

If guarantees and safeguards existed to-day keeping our ports open, by all means compare the guarantees you would get under the Declaration of London with those you have to-day and see which are the greater, but at the present moment there are no guarantees whatever, and even if there are none under the Declaration of London, you are no worse off than you are to-day.

Further opposition to the International Prize Court and to the Declaration was made on the ground that both the Hague Convention (No. 7), relative to the conversion of merchant ships into war ships, and the Declaration left unsettled the question whether such conversion might take place *on the high seas*. It is difficult to see what argument can be drawn from that fact. Without the above convention and the Court the great Powers will undoubtedly exercise a right which they declare they are unwilling to abandon. Far from "legalizing piracy" or "reintroducing privateering" by its failure to forbid conversion on the high seas, Convention No. 7 actually places important restrictions upon the conversion *in general* of merchant ships into war ships, and England can continue to treat such ships as have been converted *on the high seas* as she sees fit — the decisions of the International Court of Prize, even should it in some way recognize the legality of conversion on the high seas, cannot affect the relations between the belligerents themselves, inasmuch as the question of conversion on the high seas is specifically excepted from Convention No. 7.

Opponents of the Declaration endeavored to arouse public sentiment against the article of the Declaration permitting the destruction of neutral prizes when the observance of the general rule forbidding their destruction would "involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time." Sir Robert Finlay describes the article as "a relapse into the methods of barbarism." Again, it is difficult to see how the Declaration will make matters worse than they now stand. Without the Declaration, Russia, Germany, Austria, France, Italy, and Japan will exercise the right they assert, whereas under it there will at least be some restrictions upon its exercise. The restriction (Art. 50) that all persons on board the ship must first be placed in safety before the ship is destroyed would, as Mr. Bray points out in his monograph on the Declaration, make "the presence of another neutral ship to which the crew can be transferred . . . practically a *sine qua non*."

It is not contended here that the Declaration of London is an ideal code of naval law in time of war. There are several rules in it which

clearly do not represent an ideal system. It would have been progressive policy to have declared private property of the enemy immune from capture at sea as it now is on land. Food-stuffs should have been placed in the free list, and the prevention of commerce in them left to blockade. The destruction of neutral prizes should have been unconditionally forbidden. These last two rules would have prevented the many disputes that will undoubtedly result from the application of the present rules, which from their nature cannot be applied in a precise and rigid manner. But though not an ideal code, the Declaration is a great advance from the present uncertainty in the law, which amounts in fact to an absence of law.

The question of the ratification of the convention creating the International Prize Court, although it was the immediate object of the Naval Prize Bill, was a minor feature in the discussion of it. Criticisms were passed upon the organization of the court, to the effect that English commercial interests, the largest in the world, would be subjected to a court in which England would be represented by only one judge out of fifteen. The argument seems to overlook the fact that if there is no international prize court English commercial interests will be subjected to a belligerent court, from which no appeal can be taken. Theoretically it is possible for England to protest diplomatically against the decision of a belligerent court, but if the protest is unavailing, as it was during the Russo-Japanese war, there is no redress but war, which is hardly an acceptable form of redress when such comparatively small interests are at stake.

On the whole, then, it would seem that Great Britain stands to gain by the Declaration more than she stands to lose; and in addition consideration must be given to the fact that Great Britain, together with the other nations, gains more in having *definite rules* agreed upon, even at some cost to its theoretical rights, than in leaving the law in its present chaotic state. It is unfortunate that the Declaration had to be subjected to public opinion at such an inopportune time. It would seem reasonable that the rules formulated by the chosen delegates of a nation at an international conference should have a strong claim for acceptance on the part of the people. When nations meet in conference it becomes clear from the start that compromise is the only possible means of securing agreement. Each nation must be ready to surrender what it considers less important for what it considers essential; and at times even essential interests must be limited and circumscribed, if a solution is to be found

which will be satisfactory to all. But the necessity for this resort to compromise is almost entirely overlooked when the rules agreed upon in a conference of delegates are submitted to national parliaments for ratification. The expressions of public opinion regarding the advisability of the adoption by a given nation of an agreement like that of the Declaration of London invariably reflect a narrow national point of view, which has little sympathy with concession as a principle. Moreover, the public opinion of one country, while tending to magnify the concessions which have been made to others, can seldom realize the importance which other nations attach to the concessions they have made. The statement of M. Renault in his report accompanying the Declaration and explaining its provisions gives expression to the spirit which animated the conference:

The solutions have been extracted from the various views or practices which prevail and represent what may be called the *media sententia*. They are not always in absolute agreement with the views peculiar to each country, but they shock the essential ideas of none. They must not be examined separately, but as a whole, otherwise there is a risk of the most serious misunderstandings. In fact, if one or more isolated rules are examined either from the belligerent or the neutral point of view, the reader may find that the interests with which he is especially concerned are jeopardized by the adoption of these rules. But they have another side. The work is one of compromise and mutual concessions. Is it, as a whole, a good one?

We confidently hope that those who study it seriously will answer that it is. The Declaration puts uniformity and certainty in the place of the diversity and obscurity from which international relations have too long suffered. The Conference has tried to reconcile in an equitable and practical way the rights of belligerents with those of neutral commerce; it consists of Powers whose conditions, from the political, economic, and geographical points of view, vary considerably. There is therefore reason to suppose that the rules on which these Powers have agreed take sufficient account of the different interests involved, and hence may be accepted without objection by all others.

It is as yet too soon to predict whether the House of Commons will attempt to use its power of overruling the veto of the House of Lords. Considering that the bill passed by a majority of only forty-seven it does not seem likely that the Government will attempt to pass it until the present state of public opinion has changed. It is to be hoped that in due time English public opinion will realize that in repudiating the International Prize Court, with the Declaration of London as its code, a step backward has been taken. The International Court of Prize stands as the first truly international court in the history of the world. It gives promise, if adopted, of gradually accustoming the world to a code of law

truly international in character, and in addition it offers a means of familiarizing the nations with the idea of a court of arbitral justice, which it was sought to create at the Second Hague Conference, but which could not be carried into effect for lack of agreement as to the method of constituting its membership.

THE PASSPORT QUESTION BETWEEN THE UNITED STATES AND RUSSIA.

The Jewish question, or so-called "passport question," with Russia arises out of the fact that the Russian Government, for certain historical reasons based on economic and political considerations, reserves the right to exclude from entry into Russia all alien Jews. For this purpose the point of religious faith has been adopted as the readiest test or shibboleth of race. Very many exceptions are made to the rule of exclusion, so that in practice very few persons of Jewish race or religion who have legitimate business in Russia are excluded. These rules and exceptions are applied alike to all nationalities other than Russian.

The Jewish question is to be carefully distinguished from the questions arising from the unlawful emigration and naturalization in other countries of Russian subjects. Russia is one of those countries which not only denies the right of expatriation, and therefore regards as invalid the naturalization which any of her subjects may secure in foreign countries, but imposes severe penalties therefor. It is more usual in practice, however, for the Russian consuls simply to refuse the necessary visé to the passports of naturalized Americans who were formerly subjects of Russia.

The Jewish question is also to be distinguished from that arising out of Russia's refusal to waive the claim of military service in the case of her subjects who have emigrated.

The legal elements involved in the present question arise out of the Treaty of Commerce and Navigation concluded between the United States and Russia in 1832. Article I of that treaty reads as follows:

There shall be between the territories of the high contracting parties, a reciprocal liberty of commerce and navigation. The inhabitants of their respective States, shall, mutually have liberty to enter the ports, places, and rivers of the territories of each party, wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs, and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing, and particularly to the regulations in force concerning commerce.

For thirty years it has been contended by certain elements of opinion in this country that the exercise or assertion by the Russian Government of a right to exclude from Russian territory any American citizen on the ground that he professes the Jewish faith is inconsistent with the spirit of the Treaty of 1832.

The agitation of the question in the United States has been particularly active during the past year. On February 10th last, Mr. Herbert Parsons, of New York, introduced in the House of Representatives a joint resolution calling upon the President to denounce the Treaty of 1832 on the ground that Russia had violated that treaty by subjecting American citizens to a discrimination based upon religious belief. Five other resolutions in identical terms were also introduced in the House. On April 6th Mr. Sulzer, of New York, introduced a resolution substantially similar to the Parsons resolution, but referring not to "religious belief" alone, but to "race or religion." Senator Culberson had meanwhile introduced a resolution, "that it is the sense of the Senate that the Treaty of 1832 with Russia be abrogated." No action on any of these resolutions was taken by either House of Congress during the special session. Upon the reassembling of Congress on December 4th last, Mr. Sulzer again introduced his resolution for the termination of the treaty. This resolution passed the House by a vote of 301 to 1 (87 members not voting) on December 13th. The text of the resolution reads as follows:

RESOLVED, etc., That the people of the United States assert as a fundamental principle that the rights of its citizens shall not be impaired at home or abroad because of race or religion; that the Government of the United States concludes its treaties for the equal protection of all classes of its citizens, without regard to race or religion; that the Government of the United States will not be a party to any treaty which discriminates, or which by one of the parties thereto is so construed as to discriminate, between American citizens on the ground of race or religion; that the Government of Russia has violated the treaty between the United States and Russia, concluded at St. Petersburg, December 18, 1832, refusing to honor American passports duly issued to American citizens, on account of race and religion; that in the judgment of the Congress the said treaty, for the reasons aforesaid, ought to be terminated at the earliest possible time; that for the aforesaid reasons the said treaty is hereby declared to be terminated and of no further force and effect from the expiration of one year after the date of notification to the Government of Russia of the terms of this resolution, and that to this end the President is hereby charged with the duty of communicating such notice to the Government of Russia.

The debates in the House give expression to the criticisms against the treaty which have been advanced for many years from public and private sources. These criticisms may be summed up as follows:

1. The provisions of Article I of the treaty are general and admit of no exception; hence the refusal by Russian consuls to visé passports of American Jews is a violation of that article.

2. There has been discrimination (only one case is cited) against American Jews, in that a passport which the Russian consul at New York refused to visé, was viséd by the Russian consul at London.

3. The clause "on condition of their submitting to the laws and ordinances there prevailing" refers to persons who have been admitted into the country, and does not acknowledge a right on the part of Russia to exclude a given class of persons.

4. Even though Russia can not be charged with having violated the treaty, the compact is one which is no longer responsive to the political principles and to the commercial needs of the two countries.

5. The treaty, in the closing sentence of Article X, recognizes a right on the part of Russia to enforce the doctrine of indefeasible allegiance. Inasmuch as the United States has long repudiated that doctrine, it should not be a party to a treaty which recognizes it.

6. The United States can not constitutionally acquiesce in any treaty which would permit a foreign government to make between American citizens religious or racial distinctions of which the United States itself could not take cognizance.

On the other hand, the Russian view of this question appears to be that the treaty contains of course no specific reference to the "Jewish Question," which in fact arose, as between Russia and the United States, almost half a century after the conclusion of the treaty; that neither by international law and comity nor by treaty are Americans or other aliens entitled to other treatment than that accorded to Russian subjects, among whom Russian law distinguishes according to race or religion; that in the absence of special provisions, the general concession of rights to the citizens of one party to travel in the territories of the other can not be considered as precluding either of the contracting governments from its natural sovereign right to prevent the immigration or access of any class or category of aliens whose presence it considers incompatible with its own domestic interests; that the practice of the United States in this respect, sanctioning the exclusion of Mongolians, of believers in polygamy, and of theoretical anarchists, is itself inconsistent with any other view of

such a general treaty provision; that whereas the Russian laws complained of may potentially exclude approximately two million American Jews (although the number actually refused admittance to Russia is declared to be insignificant), on the other hand, the American laws exclude potentially many millions of Russian Mongolian subjects, and Mohammedans who profess theoretical adherence to the polygamous tenets of their faith.

Overlooking the many extravagant statements that have been made in denunciation of the Treaty of 1832, it seems reasonably clear that the treaty is inadequate. Whether rightfully or wrongfully, Russia has interpreted the treaty in such a way as formally to exclude from her territory an important class of American citizens. Diplomatic representations have thus far been unable to obtain from Russia a more liberal interpretation. The United States may well refuse to continue to be a party to a treaty in which it recognizes or acquiesces in doctrines which are contrary to its political principles of religious freedom and the right of expatriation. It is another question to assert that Russia has been guilty of violating the treaty, and, as was pointed out by Mr. Root in his address before the Senate, those who have been so ready to make the charge would do well to consider the policy of the United States in a closely analogous matter. As a point of law it may be observed that the right to exclude whatever persons it pleases from entrance into its territories is one of the sovereign rights of a state, and that nothing less than an express renunciation of that right can be regarded as estopping the state from asserting it. Russia claims that by the general terms of the Treaty of 1832 in which she agreed that inhabitants of the United States shall have liberty to enter her territories, she did not surrender her fundamental right to exclude any class of persons whose presence in her territory she might later consider dangerous to her interests. What has been the policy of the United States? In the original Chinese Exclusion Act of May 6, 1882, as amended by the Act of July 5, 1884, it is held (Section 15) that the provisions of the Act apply to all Chinese "whether subjects of China or any other foreign power." In 1894 an opinion of Attorney-General Olney was rendered, holding that natives of China who have become citizens of Great Britain can not enter the United States. It would seem, then, that the United States has not regarded the exclusion of Chinese who are subjects, or in the language of the treaty, inhabitants, of Russia as inconsistent with the Treaty of 1832.

What will be the situation if the treaty is abrogated? Unless another

treaty is made in the meantime, the relations between the United States and Russia will fall back upon the general rules of international law, and American citizens will have only such privileges in Russia as that country may, in accordance with the comity of nations, deem it to her interest to grant. It is, however, confidently asserted that in the year which must elapse before the present treaty expires, the two governments may be able to come to an understanding and formulate an agreement which will be satisfactory to both of them.

On December 17, the President, presumably having regard to the almost unanimous expression of opinion in the House of Representatives in favor of terminating the treaty, caused the Ambassador at St. Petersburg to hand to the Russian Minister for Foreign Affairs on December 17th a communication giving the official notification contemplated by Article 12 of the treaty, whereby its operation would terminate, in accordance with its terms, on January 1, 1913. The note pointed out that the old treaty had been recognized as "no longer fully responsive in various respects to the needs of the political and material relations of the two countries," and that it had from time to time given rise to certain regrettable controversies; and it expressed the desire of the American Government to renew the efforts that had been made to negotiate a modern treaty of friendship, commerce, and navigation.

On December 18th the Senate Committee on Foreign Relations presented to the Senate a substitute for the House resolution. The text reads as follows:

Whereas the treaty of commerce and navigation between the United States and Russia, concluded on the 18th day of December, 1832, provides in Article XII thereof that it "shall continue in force until the first day of January in the year of our Lord one thousand eight hundred and thirty-nine, and if one year before that day one of the high contracting parties shall not have announced to the other by an official notification its intention to arrest the operation thereof this treaty shall remain obligatory one year beyond that day, and so on until the expiration of the year which shall commence after the date of a similar notification;" and

Whereas on the 17th day of December, 1911, the President caused to be delivered to the Imperial Russian Government by the American Ambassador at St. Petersburg an official notification on behalf of the Government of the United States announcing intention to terminate the operation of this treaty upon the expiration of the year commencing on the 1st day of January, 1912; and

Whereas said treaty is no longer responsive in various respects to the political principles and commercial needs of the two countries; and

Whereas the constructions placed thereon by the respective contracting parties differ upon matters of fundamental importance and interest to each; Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the notice thus given by the President of the United States to the Government of the Empire of Russia to terminate said treaty in accordance with the terms of the Treaty is hereby adopted and ratified.

It will be observed that the resolution makes no mention of the political principles held by the United States, and omits the charge that Russia has violated the treaty. The substitute resolution was concurred in by the House on December 20th and approved by the President on December 21st.

THE INTERNATIONAL JOINT COMMISSION BETWEEN THE UNITED STATES
AND CANADA

On January 11, 1909, a treaty was signed between Great Britain and the United States concerning the boundary waters between the United States and Canada, the ratifications of which were exchanged on May 5, 1910. The treaty had a threefold purpose: first, to prevent disputes regarding the use of boundary waters; second, "to settle all questions which are now pending between the United States and the Dominion of Canada, involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier"; and third, "to make provision for the adjustment and settlement of all such questions as may hereafter arise." It would therefore appear that the existence of disputes regarding the use of boundary waters gave the opportunity, which was eagerly seized, to agree to settle all pending questions, whatever their nature; and at the same time, in order that the friendly relations between Canada and the United States should not be disturbed, Great Britain and the United States agreed to make a provision for the adjustment and settlement of future disputes. It is not the purpose of the present comment to analyze in detail this important treaty, as it has been the subject of an extended comment in a previous issue of the *Journal*.¹ It is intended merely to call attention to the method by which the three classes of disputes are to be settled peaceably and the steps taken to make the method effective.

By Article VII of the treaty Great Britain and the United States agree to establish a permanent International Joint Commission.

¹ See Editorial Comment in the July, 1910, number, p. 668, and text of the treaty in the SUPPLEMENT for July, 1910, p. 239.

Article VIII clothes the commission with jurisdiction of the differences specified in Articles III and IV of the treaty, which are, however, immaterial for the present purpose.

Article IX provides that:

any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

It is provided by a subsequent paragraph of the same article that:

such reports of the commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award.

That is to say, in the differences specified in Articles III and IV of the treaty the commission is to act as a court of law and render judgment, whereas under Article IX the commission shall on the request of either government examine and report on the law and the facts, but their findings shall not be binding either as a decision or as an arbitral award. It is, however, important to note that the contracting parties agree to refer questions from time to time and that an obligation to do so is created by express language, for in such cases the word "shall" is construed as mandatory. Were the commission limited to these important categories it would be able to render signal service to the cause of international peace and good understanding; but the tribunal is invested with a greater usefulness by Article X, although a moral, rather than a legal, obligation is created because the contracting parties do not bind themselves absolutely to refer future differences but state that they "may be referred." The text of this important article is as follows:

Any questions or matters of difference arising between the high contracting parties involving the rights, obligations, or interests of the United States or of the Dominion of Canada either in relation to each other or to their respective inhabitants, may be referred for decision to the International Joint Commission by the consent of the two parties, it being understood that on the part of the United States any such action will be by and with the advice and consent of the Senate, and on the part of His Majesty's Government with the consent of the Governor General in Council. In each case so referred, the said commission is authorized to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions

and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

It will be observed that no reservation or qualification of any kind is contemplated, for the article expressly says: "*any questions or matters of difference arising between the high contracting parties involving rights, obligations, or interests . . . may be referred.*" It is intended, however, that the decision reached shall bind the governments, because any reference is to be "by and with the advice and consent of the Senate," for if the commission is unable to agree, the "questions or matters shall thereupon be referred for decision by the high contracting parties to an umpire chosen in accordance with the procedure prescribed in the fourth, fifth, and sixth paragraphs of Article XLV of the Hague Convention for the Pacific Settlement of International Disputes, dated October 18, 1907." It is further provided in the last clause of this important article that the umpire so chosen "shall have power to render a final decision with respect to these matters and questions so referred on which the commission failed to agree." It is not too much to say that this article constitutes a permanent international tribunal between Canada and the United States to which any questions or matters of difference arising between them may be referred and decided by the principles of law and justice.

The United States appointed as its commissioners the late Senator Thomas H. Carter, the Honorable James A. Tawney, and Mr. Frank Sherwin Streeter, and Great Britain appointed the following Canadians: the Honorable T. Chase Casgrain, the Honorable Henry A. Powell, and the Honorable Charles A. McGrath. To fill the vacancy caused by the death of Senator Carter, the United States appointed the Honorable George Turner, formerly Senator from Washington, commissioner in the Alaskan boundary dispute, and counsel for the United States in the recent Fisheries Arbitration. The commissioners met at Washington on January 10, 1912, and organized.

The opportunity is afforded the commission to establish beyond peradventure the advantages of a permanent international tribunal in deciding according to law and justice controversies that arise between the United States and the Dominion of Canada, and it is gratifying to learn from the addresses delivered by Mr. Commissioner Tawney on behalf of the United States, and by Mr. Commissioner Casgrain, on behalf of Canada,

that the importance of the tribunal and the services it may render, if it act under a sense of judicial responsibility, are fully appreciated by the tribunal as a whole. The opening addresses follow in full.

Address of Mr. Commissioner Tawney.

We are met to organize the International Joint Commission authorized by the treaty between the United States and Great Britain, signed January 11, 1909, and proclaimed May 13, 1910.

Personally, and on behalf of my colleagues, I express the belief that upon the interpretation of the powers and duties of this commission and the ability of its members to disassociate themselves in its service on this commission from their individual relations to their respective governments, depends the success or failure of this international effort to create a judicial tribunal, broader than our respective nationalities and almost continental in its jurisdiction, for the adjudication of differences that now exist or that may hereafter arise along our common frontier.

On Christmas eve, 1814, there was concluded and signed in the old cathedral at Ghent a treaty which began with this significant and important declaration: "There shall be a firm and universal peace between His Britannic Majesty and the United States and between their respective countries, territories, cities, towns and people of every degree without exception of places or persons." That declaration was comprehensive and so attuned to the Christmas spirit of universal peace that pessimists criticized the negotiators for the use of sentimental rather than practical expressions in treaty making. Since then all misunderstandings and controversies between these two nations have been settled by an appeal to reason rather than to passion. The Treaty of Ghent has been sacredly observed for 98 years, during which time every misunderstanding between Great Britain and the United States has been settled either through established diplomatic agencies or by a temporary commission composed of the representatives of both nations. Notwithstanding this fact, in our judgment this International Joint Commission is the most promising agency that has yet been created for the settlement of controversies between these two nations; because it brings together, face to face, representatives of Canada and the United States to impartially consider and adjudicate the questions that now exist or that may develop along our international boundaries which stretch nearly four thousand miles across the continent, where two great peoples are living as neighbors but under two national jurisdictions.

Plans have been inaugurated in the United States, in Canada and in England to celebrate the centennial of the Treaty of Ghent on both sides of the boundary and on both sides of the Atlantic. Such a movement can only result in a profound sentiment for international peace, and we can conceive of no greater contribution to its success than the calm, judicious effort of the members of this commission to carry into effect the newer treaty of January 11, 1909. The Treaty of Ghent at the beginning of the nineteenth century opened the way to inquiry as to where should be the exact international boundary, and it was followed by an agreement to dismantle all forts and warships along that boundary. The treaty of 1910 begins the twentieth century with a commission to which may

be referred for inquiry and adjudication all possible questions of disagreement between the Dominion of Canada and the United States, their provinces and states and their respective peoples. This is an effort to write into international law the sentiment of the peoples of two great countries. We have, therefore, a powerful incentive to carry forward this work of a century, in which the emblems of force have given way to the symbols of peaceful agencies for the judicial settlement of all possible international controversies which the established peaceful agencies for that purpose of the two governments may be unable to determine.

The work of promoting closer and more direct relations between the two great peoples on this continent who have the same language, come from the same race, have the same common fountain of law, the same traditions, and similar institutions of government as well as the same ambitions for the continued success of their respective governments, is in fact the work of blazing the trail for the judicial settlement of all disputes where they occur between any two great nations. This is a work that any man may well appreciate the honor of having been selected to engage in.

The chief cause for congratulation, however, is that this treaty has provided a means for frank, direct and constant relations between the two great neighboring peoples who inhabit the greater part of the North American continent, and who must live in amicable relations to realize the ultimate ideal of our Anglo-Saxon civilization. This commission constitutes the medium for this direct communication, and to it, by the express terms of the treaty, may be referred for consideration and settlement all questions of difference that may arise between the peoples living along our common frontier. Although the treaty was signed January 11, 1909, it expressly authorizes and clothes this commission with jurisdiction to consider and determine all questions of difference, without reservations or qualifications of any kind. As a distinguished Canadian jurist, Mr. Justice Reddell of the King's Bench of Ontario, has well said: "This may be called a miniature Hague Tribunal of our own; just for us English-speaking nations of the continent of North America."

I am not idealist enough to assume that any of us can wholly divest himself of national sentiment to here assure the world that he has reached that state of human perfection that constitutes the absolutely impartial judge in international affairs; but I believe we all realize our obligation to fairly and fully examine every question that may be presented and try to reach a judicial settlement that will contribute to the better understanding and bear out the spirit of the treaty, which is an agreement in part for the joint regulation of common property of great value to the peoples on both sides of the international boundary. I do not understand that we are the agents of separate governments to meet and bicker over contested questions, but rather the joint representatives of the two governments to cooperate in the examination and judicial settlement of questions that are of mutual interest.

As members of this commission we are, therefore, neither Canadians nor Americans, but we are each and all representatives of all the people on both sides of our international boundary line. We can have before us no disputes or disagreements about where this boundary is, and in so far the employment of the terms "Boundary Treaty" or "Waterways Treaty" is misleading. We

are to consider the uses, diversions, and obstructions of the boundary waters as a primary duty and also adjudicate any and all other questions of difference or disagreement between the peoples of the United States and Canada as may from time to time be referred to the commission by the mutual action and consent of the two governments. It is, therefore, no insignificant or mere temporary and incidental work we face in the organization of this commission. We have a great responsibility resting upon us to shape our work so as to vitalize the international powers conferred by the treaty, realize the hopes and aspirations of the two peoples here living under law, and the destinies of two nations that now dominate the richest land on the globe.

I hope that whatever else we may accomplish we shall demonstrate the wisdom of Great Britain in clothing the Dominion of Canada with responsibility of conducting her own foreign relations with the United States that fall under the jurisdiction of this treaty through the medium of this commission, and that the present neighborly feeling will be strengthened by the manner in which we consider and determine the questions that will be presented.

I hope also that the spirit of our judgments will be in conformity with the principles announced by the great English judge, Lord Stowell, whose decisions are equally admired, respected, and followed in both countries, and that we may adopt the measured language of Christopher Gore, like ourselves a member of a commission to decide peacefully international disputes between Great Britain and the United States. In delivering judgment in the prize case entitled *The Maria* (1 C. Robinson, 340), decided in 1799, Lord Stowell, then Sir William Scott, said:

"In forming that judgment I trust that it has not escaped my anxious recollection for one moment what it is that the duty of my station calls for from me—namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent States. The seat of judicial authority is, indeed, locally here, according to the known law and practice of nations, but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question as if sitting at Stockholm; to assert no pretensions on the part of Great Britain which he would not allow Sweden in the same circumstances, and to impose no duties on Sweden which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered as the universal law upon the question."

And in deciding a case arising under the Jay Treaty, for the settlement of questions growing out of the War of the Revolution—a treaty which laid broad and deep the foundations of modern international arbitration—Mr. Commissioner Gore said:

"Although I am a citizen of but one nation I am constituted a judge for both. Each nation has the same, and no greater right, to demand of me fidelity and diligence in the examination, exactness, and justice of the decision."

Address of Mr. Commissioner Casgrain.

The Canadian members of the International Joint Commission desire to express their warm appreciation of the frank and clear statement submitted by the chairman of his views as to the character and scope of the work entrusted to the commission, and they most cordially join in the expression of those sentiments of international good will that exist, and which they feel sure will continue to exist, between the British people and the people of the United States.

We concur with the chairman in the belief that the appointing and bringing together of this commission will go far to settle amicably between two neighbors questions which might otherwise become embarrassing.

We feel sure that working in conjunction with gentlemen who have distinguished themselves in the service of their country, and who are known not only for their profound knowledge of public affairs, but also for the broad spirit with which they approach matters of importance, we will be able to contribute our share towards maintaining that "firm and universal peace between His Britannic Majesty and the United States" of which the Treaty of Ghent speaks.

We are fully alive to the honor and responsibility of the position to which we have been appointed by His Majesty, the King. We are citizens of an integral part of the British Empire, one of the Dominions beyond the Seas, and by the very nature of things, living on this continent and being in constant communication with our good neighbors, the citizens of the United States, we are in a position to see with our own eyes and judge with our own minds what is to the best advantage of the empire we represent. For this reason, His Majesty's government, which is ever solicitous of giving to British subjects, in whatever part of the empire they may be, and whatever may be their race, creed or color, the greatest measure of liberty and autonomy, has delegated three of His Majesty's Canadian subjects to meet the delegates of your great republic, and to deal in a fair, impartial and judicial spirit with the important questions mentioned in the treaty.

The people of Canada are largely composed of two races, the French and the English, with different languages and to a large extent different systems of law, but they are firmly united in their adherence to the Crown, and with the rest of the empire they desire that the most amicable relations should forever exist between the high contracting parties whose interests we jointly represent.

SIXTH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL
LAW.

The American Society of International Law will hold its sixth annual meeting at Washington, April 25-27, 1912, and the entire session will be devoted to consideration of the questions which might properly enter into the program of a Third Hague Conference and the proper organization which the Conference itself should receive. The subject is of very great international importance and is timely, for although the exact date

of the meeting of the conference can not be forecast, it is reasonable to suppose that it will not meet before or much after the year 1915. Although the first conference did not consider the question of its successor, it was felt that a second would inevitably be called. Indeed, Baron de Staal, its president, stated as reported by Mr. Andrew D. White and recorded in his autobiography, that a second conference would probably be called within a year after the adjournment of the first, that is to say, in 1900.¹ No steps were, however, taken, and it was not until 1904 that the question of a second conference was seriously considered. As time slipped by, the partisans of an international conference became uneasy, and in 1903 the American Peace Society presented to the Massachusetts legislature a petition for a stated international congress, requesting the President of the United States to invite the governments to join in the establishment of an international congress to meet at stated periods. In 1904 the Interparliamentary Union held its annual meeting at St. Louis in connection with the World's Fair, and on September 13, 1904, the Honorable Theodore E. Burton moved the following resolutions, which were unanimously adopted:

WHEREAS, enlightened public opinion and modern civilization alike demand that differences between nations should be adjudicated and settled in the same manner as disputes between individuals are adjudicated, namely, by the arbitrament of courts in accordance with recognized principles of law, this conference requests the several governments of the world to send delegates to an international conference to be held at a time and place to be agreed upon by them for the purpose of considering:

1. The questions for the consideration of which the conference at The Hague expressed a wish that a future conference be called.

2. The negotiation of arbitration treaties between the nations represented at the conference to be convened.

3. The advisability of establishing an international congress to convene periodically for the discussion of international questions.

And this conference respectfully and cordially requests the President of the United States to invite all the nations to send representatives to such a conference.

A few days later, on September 24, the resolutions were formally presented to President Roosevelt, who replied:

In response to your resolutions, I shall at an early date ask the other nations to join in a second congress at The Hague. I feel, as I am sure you do, that

¹ "A delegate also informed me that in talking with M. de Staal the latter declared that in his opinion the present conference is only the first of a series, and that it is quite likely that another will be held next winter or next spring." *Autobiography of Andrew D. White*, Vol. II, p. 272.

our efforts should take the shape of pushing forward toward completion the work already begun at The Hague and that whatever is now done should appear, not as something divergent therefrom, but as a continuance thereof.

On October 21, 1904, Secretary Hay invited the Powers represented at the first conference to a second conference at The Hague, and in a formal note dated December 16, 1904, Secretary Hay was able to state that the proposal had been received with general favor and that no dissent had been expressed. The Russo-Japanese war of 1904-5 had prevented Russia, which convoked the first conference, to take the initiative in summoning a second, but after the conclusion of the war the Czar expressed his willingness and desire to take the necessary steps for the convocation of a second conference, and, as is well known, President Roosevelt chivalrously yielded the initiative.

The first conference had shown the usefulness of such an international assembly and the desire was expressed in official as well as in peace circles generally that arrangements should be made for the stated and automatic meeting of future conferences. In the instructions to the American delegation to the second conference, Secretary Root said:

You will favor the adoption of a resolution by the Conference providing for the holding of further conferences within fixed periods and arranging the machinery by which such conferences may be called and the terms of the programme may be arranged, without awaiting any new and specific initiative on the part of the Powers or any one of them.

Encouragement for such a course is to be found in the successful working of a similar arrangement for international conferences of the American Republic. The Second American Conference, held in Mexico in 1901-2, adopted a resolution providing that a third conference should meet within five years and committed the time and place and the programme and necessary details to the Department of State and representatives of the American States in Washington. Under this authority the Third Conference was called and held in Rio de Janeiro in the summer of 1906 and accomplished results of substantial value. That Conference adopted the following resolution:

"The Governing Board of the International Bureau of American Republics (composed of the same official representatives in Washington) is authorized to designate the place at which the Fourth International Conference shall meet, which meeting shall be within the next five years; to provide for the drafting of the programme and regulations and to take into consideration all other necessary details; and to set another date in case the meeting of the said conference can not take place within the prescribed limit of time."

There is no apparent reason to doubt that a similar arrangement for successive general international conferences of all the civilized Powers would prove as practicable and as useful as in the case of the twenty-one American states.

Pursuant to these instructions, Mr. Choate, on behalf of the American delegation, discussed the question of future conferences with various members with the result that on September 2, 1907, the conference unanimously adopted in plenary session the following recommendations:

The conference recommends to the powers the assembly of a Third Peace Conference, which might be held within a period corresponding to that which has elapsed since the preceding conference, at a date to be fixed by common agreement between the powers, and it calls their attention to the necessity of preparing the programme of this Third Conference a sufficient time in advance to ensure its deliberations being conducted with the necessary authority and expedition.

In order to attain this object the conference considers that it would be very desirable that, some two years before the probable date of the meeting, a preparatory committee should be charged by the governments with the task of collecting the various proposals to be submitted to the conference, of ascertaining what subjects are ripe for embodiment in an international regulation, and of preparing a programme which the governments should decide upon in sufficient time to enable it to be carefully examined by the countries interested. This committee should further be intrusted with the task of proposing a system of organization and procedure for the conference itself.

The difficulties in the way of securing agreement upon this important subject were explained by Mr. Choate in his address before the American Society for Judicial Settlement of International Disputes² at its meeting in Washington on December 17, 1910. It will be noted that the important recommendation does not specify or charge any Power with the duty of calling the conference, but the fact that the second conference was proposed by President Roosevelt is recorded in the opening sentences of the final act of the second conference signed by the delegates of all the nations. It would thus appear that the Powers do not need to wait in the future upon the initiative of Russia and that any Power is free to propose the meeting of the conference whenever it pleases. The second conference was unwilling to fix a precise date for the meeting, but recommended that it "might be held within a period corresponding to that which has elapsed since the preceding conference," that is to say, approximately eight years from 1907. It further recommended that the date should be "fixed by common agreement between the Powers," and it called their attention "to the necessity of preparing the programme * * * a sufficient time in advance to insure its

² Proceedings of American Society for Judicial Settlement, pp. 344-347.

deliberations being conducted with the necessary authority and expedition." This latter recommendation is of very great importance because it was evident, even to a casual observer, that adequate preparation had not been made for the discussion of the various proposals contained in the programme. To obviate this defect, which delayed the conference and prolonged its sessions, the conference recommended that "some two years before the probable date of the meeting, a preparatory committee should be charged by the governments with the task of collecting the various proposals to be submitted to the conference, of ascertaining what subjects are ripe for embodiment in an international regulation, and of preparing a programme which the governments should decide upon in sufficient time to enable it to be carefully examined by the countries interested."

Supposing that the conference is to be held on or about the year 1915, the preparatory committee should be appointed in the year 1912, and it is therefore important that in the year 1912, the questions to be included in the programme should be the subject of study and reflection. It is not stated how the preparatory committee is to be formed, but like the date of reunion, it probably will be by common agreement between the Powers, meaning thereby, it is believed, the larger Powers. A committee of 44 or 45 members would be unwieldy, and no doubt the committee ultimately appointed will consist of a much smaller number. The preamble to the final act shows, as has been said, that the second conference was called by the President of the United States, and it would appear that either he or any chief executive can take the initiative. The date of meeting will likely be fixed as recommended by the conference, by a common agreement, and the composition of the preparatory committee will no doubt be the subject of diplomatic negotiations in which the caller of the conference will play a large, if not determinative, rôle.

What subjects should be included, it would be premature and presumptive to outline in this place. It is however appropriate that learned bodies such as the Institute of International Law and the American Society of International Law should consider the matter and make suggestions, and it is to be hoped that publicists of standing in different countries will express their views as to the proposals to be submitted to the conference and as to the subjects which are "ripe for embodiment in an international regulation." In order to contribute its mite of

wisdom, the programme committee of the Society has decided to devote the entire sessions beginning Thursday night and continuing Friday morning and evening, and Saturday morning, April 25-27, to the consideration of a tentative programme of a Third Conference.

If the duties of the preparatory committee were limited to preparing the programme for the third conference, it would have plenty of work to do, but it is entrusted in addition "with the task of proposing a system of organization and procedure for the conference itself." The meaning of this is tolerably clear. The conference is no longer the child of any one Power. It can be proposed by any nation interested in its meeting, and the organization and procedure of the conference are to be determined, not merely by the proposer of the conference as in the past, but by the wit and wisdom of the preparatory committee. It is common knowledge that much dissatisfaction was created at the second conference by the manner in which the presidents were appointed and the conference run by a self-constituted committee of the larger Powers. The time is past for any Power, however great and enlightened, to determine the programme, even in consultation with others, to dominate by the selection of its presiding officers, and to control its deliberations and its results by a system of procedure imposed by any one Power. The effect of the recommendation for the calling of a Third Conference is to internationalize in fact as well as in theory the Hague Conferences and to subject them to the control of the Powers taking part in their proceedings. The American Society of International Law will consider not merely the questions "ripe for embodiment in an international regulation," but also the "system of organization and procedure for the conference itself." As befits an international question, the programme committee has decided that these matters should be discussed from an international point of view, and it is expected that authoritative publicists of Latin America will take part in the proceedings, so that the view presented will be the views not of a section or of a country, but of America as a whole.

It is expected that the members will as usual be received by the President of the United States as honorary president of the Society and the session will end with the customary dinner at which informal addresses will be delivered. The programme will be sent to the members of the Society in sufficient time to enable them to prepare themselves not only to attend, but to take part in the discussion of any phases of the question which may interest them.

THE CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE AND ITS PROJECTS

Comments in the *JOURNAL* during the preceding year have called attention to the creation of the Carnegie Endowment for International Peace and the progress made in its organization. On December 14, 1911, the Board of Trustees assembled at the headquarters of the Endowment in Washington, and approved the recommendations of the Executive Committee regarding the work to be undertaken in the near future, and made the necessary appropriations to carry it on.

The statement of the principles which should guide the Endowment in outlining and executing its work, and the enumeration and description of the projects approved by the Board of Trustees, are based upon the report of the Executive Committee, from which, in appropriate instances, direct quotations are made.

In the first place, the principles which should guide the Endowment in prosecuting its work are stated by the Executive Committee as follows:

(1) That it will not be wise for the Endowment to enter into competition with existing agencies or to seek to supplant them by its own direct action or by the creation of new organizations to cover the same field, but rather

(a) to give greater strength and activity to the existing organizations and agencies which are found to be capable of doing good work;

(b) to produce better organization by bringing about union in systematic relations of scattered organizations and eliminating duplication of effort and conflict of interest; and,

(c) to cause the creation of new organizations only in those parts of the field which are not now effectively covered.

The successful conduct of a work of this kind requires the voluntary cooperation of great numbers of people who are moved by their interest in the cause of peace. Such cooperation can not be bought with money, and it can not be controlled by money. It can be greatly aided and made more effective by the judicious use of money. It would be impossible to duplicate the personnel now engaged in peace work in many directions. The continued activity of the workers depends upon the continuance of their interest, and that is largely enlisted in the organizations which they have built up, often with much labor and sacrifice. It would be an enormous waste of power to attempt to substitute new and different organizations.

(2) That a considerable part of the work of the Endowment must be prosecuted in countries other than the United States. There are many countries in which the problem presented by the proposal to substitute peace for war as the normal condition of mankind is much more complicated and difficult than it is with us at home, and there are many countries in which the ideas that we have come to regard as fundamental and indisputable have made but little progress. All true advance towards a stable condition of peace in the world must be a general advance. The chief barrier to warlike aggression is the

general adverse opinion of mankind and the reluctance of nations to incur the condemnation of the civilized world by conduct which, in that opinion, is discreditable.

To render our work most effective it must accordingly be carried on in many different countries.

(3) That in carrying on our work in other countries, and especially in those countries of Europe with which questions of peace and war are much more pressing and difficult than with us, it is of vital importance that we should not present ourselves as American missionaries undertaking to teach the people of other countries how they should conduct their affairs, but that we should rather aid the citizens of those other countries who are interested in the work which tends to promote peace to carry on that work among their own countrymen, and that to all such work the first conclusion above stated applies with special force.

(4) That one direction in which work for general peace especially needs strengthening is along the line where the sentiment for peace comes into immediate contact with the difficulties and exigencies of practical international affairs. The reconciliation of the two requires knowledge of the practical side, not so much of specific international difficulties as of the underlying forces which move nations, the development of their methods and motives of action and the historical development of their relations. To make progress in this it is necessary to enlist the services of men competent to carry on thorough, scientific inquiry and to produce definite, certain, and authoritative conclusions which may be made the competent basis of education and argument, appealing to practical men conducting affairs.

The following projects, calculated to carry out the purposes of the Division of International Law, were authorized:

1. The collection and publication of all known international arbitrations upon a plan similar to that furnished by the series of law reports of English and American courts. The decisions of the permanent court of the Hague will be included in this collection, and will, in addition, be separately published so as to form an independent series. The entire work will be so arranged that it can be continued indefinitely by the publication of further volumes containing future cases and decisions as they are submitted to, and decided by, arbitral tribunals. It is estimated that this monumental work, whose usefulness it is impossible to overestimate, will require at least twenty-five volumes.

2. The separate collection and publication of all known arbitration treaties and of special clauses of arbitration to be found in general treaties. This work, which is already under preparation, will probably appear in the course of a year or two.

3. The establishment in the Peace Palace at The Hague of an international academy for theoretical and scientific instruction in the various branches of international law and cognate subjects, so that "teachers and students of international law of all countries may have an opportunity to learn to reconcile their views and to cooperate in a regular and systematic way toward a better mutual understanding of differing opinions, and towards progress in reaching mutual agreements about what the law is and ought to be."

The advisability of the establishment of such an institution was discussed at the Second Hague Peace Conference, upon the recommendation of M. Sturdsa, then Prime Minister of Roumania, and warmly recommended by M. Nelidow, President of the Conference. The project has, since then, been the subject of much general discussion, and great interest has been manifested in the plan and its realization.

The academy is not to compete with existing institutions, for its sessions are to be held in the months of August, September and October, when European institutions are not in session. It will differ from existing schools of political science by having its small and changing faculty chosen from the leading teachers of international law selected from the world at large, and the international element will be accentuated by the fact that no more than one professor will be chosen from any country at any one time. In this way the teaching will be international in fact as well as in theory. In addition, eminent lecturers will be invited to deliver courses upon important and timely topics, which will be published in the form of monographs. In this way international law will be enriched by a series of special studies by those most competent to express matured opinions.

4. For the purpose of popularizing international law and its application to concrete problems, the Board of Trustees voted, upon recommendation of the Executive Committee, an appropriation to a selected list of journals of international law.

5. In order to secure the best available advice and counsel in the projects to be undertaken by the Division of International Law, and if possible, cooperation in its actual work, it was recommended by the Executive Committee and approved by the Board of Trustees "that the Institute of International Law be invited to act, by committee or otherwise, as adviser to the Division of International Law of the Endowment, regarding the course and development of its work." On this point the report of the Executive Committee says: "To promote the usefulness

and activity of this organization, and at the same time secure the benefit of its experience and wisdom in shaping our own course, seems most desirable."

The following quotation from the report of the Executive Committee regarding the origin and rôle which the Institute has played in the development of international law, will be of general interest:

The Institute of International Law is an organization established at Ghent in 1873 and includes among its members the most distinguished living authorities in that science. It is a small body of sixty members and sixty associate members. It fills the vacancies in its own numbers and makes its selections entirely upon the basis of qualification demonstrated by the individual writings of the candidates. It has now for nearly forty years held annual or biennial meetings in which it has drafted and adopted, after full discussion and mature deliberation, model codes upon a great number of subjects, and it has rendered very great service in the systematic development of the science of international law. It is distinctly the leader of modern thought in the study of international law from the philosophical and historical point of view. It was due to the work of this body that the Hague Conferences of 1899 and 1907 were able to accomplish the results with which we are familiar. The Conferences took the work already done by the Institute and considered it as the basis of their deliberation and action very much as a legislative body bases its discussion and action upon the reports of its own committees. Further development along the lines followed by the Hague Conferences will be impossible without a great amount of preliminary and preparatory work such as the Institute does. As the Institute includes a great part of the most distinguished international lawyers of all civilized countries and a great part of the advisers of the various governments upon questions of international law, it is especially adapted to the discussion and working out of conclusions which are likely to be adopted by formal international action.

The last number of the *JOURNAL*¹ contains a complete statement of the purpose, assembly, participants and results, including the final program, of the conference of economists and publicists held at Berne in August last, under the auspices of the Endowment, in order to determine the method and scope of the inquiries to be conducted in the Division of Economics and History into the economic and historical aspects of war. The Board of Trustees voted appropriations to carry on researches, in line with the recommendations of the Conference, in Europe, Asia, North and South America.

In the Division of Intercourse and Education the following projects, quoted from the report of the Executive Committee, were authorized and the sums necessary to put them into operation provided:

¹ October, 1911, p. 1037.

(1) Promoting in the United States the strength and efficiency of the American Peace Society, including the establishment of satisfactory relations between that society and the numerous scattered local peace societies throughout the United States, so that the whole sum of activity may be brought into co-ordination, and duplication and waste of energy may be prevented.

(2) The establishment of a Secretariat and Bureau of the Division in Paris, through which the relations of the endowment with European societies and agencies may be maintained. With this Secretariat it is proposed to associate an advisory council of representative European statesmen and publicists prominently identified with the cause of peace and international arbitration. The duties of this council are to be purely advisory. It is proposed also to establish correspondents through which the Secretariat can communicate with all the different countries upon matters of interest to the work of the Endowment whenever occasion arises.

(3) Promoting the strength and activity of the American Association for International Conciliation, and, through that organization, the Conciliation Internationale, of Paris.

(4) Promoting the strength and efficiency of the Bureau Internationale Permanent de la Paix, at Berne, and the Office Central des Associations Internationales, at Brussels. Through these two general organizations it is proposed to render such aid to particular associations and agencies in Europe as may be found desirable. These are great central organizations the constituents of which are in one case the peace societies of Europe, and in the other international societies generally. Both are laboring at a disadvantage with absurdly insufficient funds and they are capable of a vast extension of usefulness.

(5) Promoting the value and circulation of a selected list of the leading periodicals devoted to the movement for peace and arbitration.

(6) Making it possible for a small number of selected and especially effective workers in the field of peace effort to devote their entire time to the work and relieving them from the necessity of turning aside to devote themselves to self-support.

(7) Establishing a more complete system of educational exchanges between Latin America and the United States and between Japan and the United States.

(8) Providing, as special opportunity and occasion may from time to time arise, for visits of leaders of opinion to foreign countries to interchange and stimulate the growth of, opinion upon subjects involved in the peace propaganda. Along the same line of occasional but useful action to be taken whenever the opportunity presents itself will come assisting the circulation in different countries of particular publications tending to stimulate thought and correct errors regarding matters which concern the maintenance of peace.

Under the same head comes the annual meeting of the Interparliamentary Union, in which the Committee would be glad to see a more active representation from the United States than practicable heretofore.

Upon the announcement, on December 14, 1910, of Mr. Carnegie's munificent endowment of the peace cause, doubt was expressed in various

quarters as to the possibility of wisely expending the income of such a large sum. The Executive Committee finds, however, as the result of the year's study, that there is a surprising scope and variety of things which may be done with advantage to promote peace, that the more the subject is studied the wider becomes the horizon which bounds the Endowment's field of usefulness, and doubt is expressed as to the sufficiency of the income to accomplish the things which ought to be undertaken.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Ann. Vie Int.*, Annuaire de la Vie Internationale, Brussels; *Arch. dipl.*, Archives Diplomatiques, Paris; *B.*, boletin, bulletin, bollettino; *B. P. U.*, bulletin of the Pan-American Union, Washington; *Clunet*, J. de Dr. Int. Privé, Paris; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain: Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *L'Int. Sc.*, L'Internationalism Scientifique, The Hague; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil générale de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs G.*, Reichs-Gesetzblatt, Berlin; *Staats.*, Staatsblad, Groningen; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain: Treaty Series.

May, 1911.

- 15 COSTA RICA—UNITED STATES. Approval by Costa Rican President of the convention for the exchange of postal money orders between Costa Rica and the Canal Zone, signed at Washington, February 20, 1911. *B. P. U.*, 33:645.

June, 1911.

- 10 COSTA RICA—UNITED STATES. Convention signed at San José to fix the status of naturalized citizens who renew their residence in the country of their origin. *B. P. U.*, 33:645.
- 17 BELGIUM—UNITED STATES. Convention signed at Washington additional to the convention signed there November 20, 1882, for the exchange of postal money orders. *B. Usuel*, June 17.

July, 1911.

- 1 AUSTRIA—HUNGARY—UNITED STATES. Arrangement effective whereby parcels post matter can be transmitted between the United States and the Ottoman Empire through Austrian post-offices. *Daily Consular and Trade Reports*, 14:512.
- 3-8 INTERNATIONAL FIBER CONGRESS held at Soerabaya, Java. An international fiber exposition continued till the end of August. *Daily Consular and Trade Reports*, 14:17.

July, 1911.

- 8 BELGIUM—JAPAN. Exchange of notes in regard to the granting of most-favored-nation treatment after July 17 until the conclusion and putting into force of a new treaty. *Monit. B.*, July 16.
- 16-19 SECOND INTERNATIONAL CONGRESS OF DANCING MASTERS met at Vienna. First at Berlin, July 23, 1908. *L'Int. Sc.* (559).
- 26-29 THIRD INTERNATIONAL UNIONIST CONGRESS met at Vehlerad, Moravia. *L'Int. Sc.* (604).
- 29 CHINA—NETHERLANDS. Ratifications exchanged at The Hague of a consular convention signed in Peking, May 8. *Peking Daily News*, August 2.

August, 1911.

- 1 GREAT BRITAIN—SIAM. Ratifications exchanged at London of a treaty respecting the extradition of fugitive criminals, signed at Bangkok, March 4, 1911. *Treaty ser.*, 1911, No. 23.
- 2 BRAZIL—CUBA. Exchange of ratifications at Habana of the arbitration treaty signed at Washington, June 10, 1909. Text in *Ga. O.*, (Cuba) August 14.
- 2-14 CARNEGIE PEACE FOUNDATION CONFERENCE OF ECONOMISTS opened at Berne. *Times*, August 3; *Advocate of Peace*, 73:194; *Mém. dipl.*, 49:487.
- 3 FRANCE—UNITED STATES. Arbitration treaty signed simultaneously at Washington and Paris. *See next item.*
- 3 GREAT BRITAIN—UNITED STATES. Arbitration treaty signed at Washington. *Arbitration with the United States*, *Spectator*, March 18. *Sir Edward Grey on Anglo-American Arbitration*. *Times*, March 15; *The Arbitration Ideal*, *do.*, March 21; the Guildhall Meeting, *do.*, April 28; *Lewin: L'alliance anglo-japonaise et le traité d'arbitrage américain*, *Q. dipl.*, 32:286-295, text. 312; *Vital Interest, Independence, Honor, Indep.*, 71:1044; *Lodge: The Arbitration Treaties and the Constitutional Powers of the Senate*, *Editorial R.*, 5:901-6.
- 4-10 INTERNATIONAL CONGRESS OF LEGAL MEDICINE met at Brussels. *L'Int. Sc.* (237).
- 7 INTERNATIONAL YACHT RACES begin at Spithead.
- 9-15 TENTH INTERNATIONAL ZIONIST CONGRESS met at Basle. *Chunet*, 38:397; *L'Int. Sc.* (584).
- 12 DENMARK—FRANCE. Treaty of Arbitration based on the Hague Convention, signed at Copenhagen. *Mém. dipl.*, 49:499.

August, 1911.

- 12-18 FIRST INTERNATIONAL CONGRESS OF PEDOLOGY met at Brussels. *Nature*, 87:170.
- 14 BELGIUM—ITALY. Publication of Law of June 4, 1911, approving treaty of obligatory arbitration signed November 18, 1910, and ratified August 14, 1911. *B. Usuel*, August 4; *Monit. B.*, September 2.
- 14-18 SECOND INTERNATIONAL CATHOLIC ESPERANTO UNION met at The Hague. *L'Int. Sc.* (523).
- 16 BELGIUM—NORWAY. Law approving treaty of commerce and navigation signed June 27, 1910. Text in *B. Usuel*, August 16; *Monit. B.*, September 28.
- 17 GERMANY—GREAT BRITAIN. Treaty signed at Berlin for combatting the sleeping sickness in Togoland and adjacent British territory. *Treaty ser.*, No. 22, 1911.
- 17 GERMANY—GREAT BRITAIN. Treaty extending sphere of operation of the treaty of extradition signed at Berlin, January 31, 1911. *Times*, August 17.
- 19 FRANCE—JAPAN. Convention of commerce and navigation signed at Paris; also, an arrangement establishing a provisional *modus vivendi* for their commercial relations. *Times*, August 24; *Mém. dipl.*, 499, 500. *J. O.*, August 24.
- 19 GERMANY—RUSSIA. Agreement regarding the Near East signed at St. Petersburg. *Times*, August 21, text, August 22; *Mém. dipl.*, 49:504, 506, text; *Q. dipl.*, 32:309, text.
- 20 ARGENTINE—CHILE. International police organized to guarantee the security of their frontiers against brigandage. *Mém. dipl.*, 49:499.
- 20-27 SEVENTH INTERNATIONAL ESPERANTO CONGRESS held at Antwerp. *Science*, 34:147; *Times*, August 30; *Mém. dipl.*, 49:505; Eighth, Cracow, 1912; Ninth, The Hague probably, 1913. *L'Int. Sc.* (518).
- 29 THIRD INTERNATIONAL CONGRESS OF LARYNX SPECIALISTS met at Berlin. *Mém. dipl.*, 49:514; *Times*, February 21.
- 31 CHINA—RUSSIA. The Conference to elaborate a new commercial treaty met at St. Petersburg. *Times*, September 1; *Mém. dipl.*, 49:515. Treaty of February 12/24, 1881, signed at St. Petersburg, in *British and Foreign State Papers*. 72:1143.

September, 1911.

- 1 The Permanent Committee of the, INTERNATIONAL ASSOCIATION FOR COMBATTING UNEMPLOYMENT, met at Ghent. *Times*, September 2.
- 1-7 SEVENTH BIENNIAL CONGRESS OF THE INTERNATIONAL FEDERATION OF STUDENTS (Corda Fratres) met at Rome. Next Congress will probably be at Cornell University, Ithaca, New York, in 1913. *Advocate of Peace*, 73:258. List of former meetings in *L'Int. Sc.* (286).
- 1-Dec. 31 EXPOSITION OF HYGIENE, at Rome. *P. A. U.*, 33:1011.
- 2 FRANCE—UNITED STATES. French text of the extradition treaty signed January 6, 1909, promulgated and made applicable to Madagascar and dependencies. *J. O.*, (Madagascar) September 9, 1911.
- 4 INTERNATIONAL CONFERENCE ON SIMPLIFIED SPELLING (English) met at London. *Times*, August 29.
- 4-8 THIRTEENTH session of the INTERNATIONAL INSTITUTE OF STATISTICS met at The Hague. *L'Int. Sc.* (154).
- 5 THE INTERNATIONAL JURY have chosen the design for the International Telegraph Union monuments to be erected at Berne. *Times*, September 6.
- 10-17 INTERNATIONAL ELECTROTECHNICAL CONGRESS was held at Turin. *J. of the Franklin Institute*, 172:503; *R. Scientifique*, 49:473; *Nature*, 87:170.
- 11 PORTUGAL. Notes handed to premier by the British Chargé, the Spanish and German ministers, and the Italian and Austro-Hungarian Chargés recognizing the Portuguese Republic. *Times*, September 12; *The Portuguese Republic*, *Times*, September 13.
- 11-15 INTERNATIONAL CONGRESS FOR STUDY AND PREVENTION OF INFANTILE MORTALITY met at Berlin.
- 11-16 ELEVENTH INTERNATIONAL CONGRESS AGAINST ALCOHOLISM met at Scheveningen and The Hague. *R. Scientifique*, 49:377.
- 12 INTERNATIONAL CONFERENCE FOR TECHNICAL UNIFORMITY OF RAILROADS met at Berne. *Mém. dipl.*, 49:290.
- 15 INTERNATIONAL. On this date the arrangement for the suppression of obscene publications signed at Paris, May 4, 1910, goes into effect. See March 15, 1911. *L'Int. Sc.* (538).
- 17 NETHERLANDS—RUSSIA. Declaration signed at St. Petersburg regarding the mutual recognition of tonnage papers. *Official Ga.*,

September, 1911.

- (Netherlands) September 29; *Collection of Laws* (Russian), No. 188, September 27.
- 18-20 INTERNATIONAL COMMISSION OF MATHEMATICAL INSTRUCTION was held at Milan. *Science*, 34:169, 509; *R. Scientifique*, 49:183.
- 18-23 FOURTH INTERNATIONAL CONFERENCE OF GENETICS held at Paris. *Science*, 34:179; *R. Scientifique*, 49:55, 440.
- 18-30 INTERNATIONAL MUNICIPAL CONGRESS AND EXPOSITION held at Chicago. *Am. Polit. Sc. R.*, 5:607.
- 19 ARGENTINE—OTTOMAN EMPIRE. Law approving the consular protocol signed at Rome, June 11, 1910. *B. O.*, September 25.
- 21 CANADA. Defeat of proposed reciprocity agreement with the United States. *The Canadian Elections*, *Spectator*, September 30; *Macdonald: The Canadian Elections and After*, *Contemporary R.*, 100:618.
- 23-26 CONGRESS OF APPLIED CHEMISTRY met at Turin. *R. Scientifique*, 49:377.
- 24-30 EIGHTH INTERNATIONAL CONGRESS AGAINST TUBERCULOSIS held at Rome. *R. Scientifique*, 49:569.
- 25 INTERNATIONAL SOCIALIST BUREAU met at Zurich. *Mém. dipl.*, 49:548.
- 27 NINETEENTH INTERNATIONAL PEACE CONGRESS The meeting at Rome was postponed till the spring of 1912 because of cholera at Rome. A meeting was held at Berne to deal with the business part only of the program. *Advocate of Peace*, 73:147, 248; *Mém. dipl.*, 49:531; *Times*, September 19.
- 28-30 INTERNATIONAL CONGRESS FOR MOTHER PROTECTION AND SEXUAL REFORM met at Berlin. *L'Int. Sc.* (236).
- 28-Oct. 1 FIIST INTERNATIONAL CONGRESS OF ORGANIZATIONS PATRONIZING INDUSTRY AND AGRICULTURE met at Turin. *Mém. dipl.*, 49:533.
- 29 ITALY—TURKEY. Italy declared war against Turkey. The Italian chargé on September 25 delivered the protest of his government at Constantinople. On September 28 Italy delivered an ultimatum; Turkey replied September 29 and appealed to the Powers September 30. Italy proclaimed the annexation of Tripoli, November 3. Texts of some of these documents in *Q. dipl.*, 32:638-9; "Y": *The Knell of the Triple Alliance*, *Fort.*

September, 1911.

R., 90:803-811; *The Attitude of Turkey towards Italy, Indep.*, 71:964; Bailey: *Italy and Turkey, do.*, 71; *Italy, Turkey, and Tripoli, Spectator*, September 30; *The Turco-Italian War and its Consequences, do.*, October 21; *The Future of Turkey, do.*, October 28; "H. E.": *The Italian Point of View, Nation*, 93:440-442; Tobruk: *Tripoli, National R.*, 58:569; *The Italian Hold-up of Turkey, Advocate of Peace*, 73:241; *La Guerre Italo-Turque, Mém. dipl.*, 49:549-550 texts; *do.*, *Q. dipl.*, 32:496-502, 559-564, 638-640; Malle terre: *La politique militaire de l'Italie, do.*, 32:193-206; Sage: *La situation de l'egypte dans le Conflit italo-turc, do.*, 32:513-524; Marchand: *Le conflit italo-turc et l'Islam, do.*, 31:551-555; Bardoux: *L'opinion britannique et l'affaire tripolitaine, do.*, 32:616-619; Corradine: *L'Ora di Tripoli, Milan*; *The Italian Case, Times*, September 30; Gregory: *The Resources of Tripoli, Contemp. R.*, 100:768-781; Johnston: *Europe and the Mohammadan World, Nineteenth Cent.*, 70:1034-1046; Hurd: *The Peril of Invasion: Italy's "Bolt from the Blue," Fort. R.*, 90:1044-1055; Ignotus: *Italian Nationalism and the War with Turkey, do.*, 1084-1096.

October, 1911.

- 1-5 INTERNATIONAL CONGRESS OF PATHOLOGY met at Turin. *Medical News*, 67:1065.
- 2 ARGENTINE-NETHERLANDS. Law approving the convention for reciprocal hospital aid signed at The Hague, September 29, 1910. *B. O.*, October 13.
- 2-10 NINTH INTERNATIONAL CONGRESS OF ARCHITECTS met at Rome. *B. del Min. de Rel. Ext.* (Ecuador) 5:11.
- 4 SEVENTEENTH INTERPARLIAMENTARY UNION. The Council of the Union met at Paris and issued a statement explaining the postponement of the meeting which was to have opened at Rome, October 3. *Times*, October 5; text in *Mém. dipl.*, 49:547.
- 5-7 INTERNATIONAL BALLOON RACE from Kansas City, Missouri, won by the Berlin II, German.
- 9 INTERNATIONAL COMMITTEE OF THE UNITED COTTON GROWING ASSOCIATION met at Berlin, *Times*, October 10.
- 9 INTERNATIONAL COMMISSION met at Berne to discuss technical questions of railroads. *Mém. dipl.*, 49:562.

October, 1911.

- 9-13 SEVENTH INTERNATIONAL CONGRESS ON CRIMINAL ANTHROPOLOGY met at Cologne. *Nation*: 93:194; *Daily Consular and Trade Reports*, 14:847. Former congresses: Rome, 1885; Paris, 1889; Brussels, 1892; Geneva, 1896; Amsterdam, 1901; Turin, 1906.
- 9-13 TENTH INTERNATIONAL MARITIME LAW CONFERENCE met at Paris. *Times*, August 18, October 10, *Mém. dipl.*, 49:566.
- 10 INTERNATIONAL SANITARY CONFERENCE met at Paris. *Medical News*, 57:1066; *R. Scientifique*, 49:313; *Clunet*, 38:1415.
- 11-12 INTERNATIONAL FEDERATION FOR THE OBSERVANCE OF SUNDAY met at Geneva. *L'Int. Sc.*, (113).
- 12-18 EIGHTH CONGRESS OF THE INTERNATIONAL INSTITUTE of Sociology met at Rome. *R. Int. de Sociologie*, 19:541.
- 12-22 INTERNATIONAL AUTOMOBILE EXPOSITION was held at Berlin. *Daily Consular and Trade Reports*, 14:1270, 1387.
- 12-22 SECOND INTERNATIONAL CONGRESS OF BREWERS met at Chicago. Brussels, 1910. *R. Scientifique*, 49:283.
- 14-20 THIRTY-THIRD ANNUAL INTERNATIONAL BREWERS' EXHIBITION AND MARKET held at London.
- 16-20 SIXTH INTERNATIONAL DRY FARMING CONGRESS AND INTERNATIONAL EXPOSITION OF DRY FARMED PRODUCTS was held at Colorado Springs, Colorado. *B. P. U.*, 33:486.
- 25-31 FIFTH INTERNATIONAL CONGRESS OF AERONAUTICS met at Turin. *Nature*, 87:123; *R. Scientifique*, 49:183.
- 26 AN INTERNATIONAL SUGAR CONFERENCE met at Brussels at the request of the Russian Government. *Mém. dipl.*, 49:563, 582.
- 29-31 CONGRESS OF NEWSPAPER MEN met at Guatemala. Preliminary meeting of the Association of the Central American Press. *B. P. U.*, 33:1011.
- 30 CHINA. An imperial decree was issued providing for the immediate promulgation of the constitution, prohibiting the appointment of members of the imperial family or nobles as ministers of state, and granting amnesty to political offenders (since 1897). *North China Herald*, 101:304; *The Manchu Renunciation*, do., 101:272; Ross: *Why the Chinese Revolt*, *Indep.*, 71:1016; *A Chinese Tallyrand*, do., 71:994; *Chinese and Manchu*, do., 71:933; *The Chinese Revolution*, *Spectator*, October 21, November 4; *China and America*, *Outlook*, 99:609; *A Constitution for China*,

October, 1911.

do., 99:657; Diosy: *The Chinese Revolution*, *Contemp. R.*, 100:704-712; Barker: *Dr. Sun Yat Sen and Chinese Revolution*, *Fort. R.*, 90:778-792; *The Crises in China*, *Times*, October 14; Saintoyant: *La Révolution chinoise*, *Q. dipl.*, 32:605-615; edicts of October 30, including the apology of the Emperor and the edict of November 3, giving nineteen articles as a basis of the constitution, do., 32:643-645; Tyan: *The Hope of China's Future*, *Contemp. R.*, 100:822, 831; Colquhoun: *China a Republic?* *Fort. R.*, 90:1032-1043; Blake: *Will China Break up? Nineteenth Cent.*, 70:1102-1108; Ellis: *The American on Guard in China*, *American R. of Rs.*, 44:714; Kinnosuki: *The Chinese Revolt: A survey*, do., 717.

- 31 Close of the INTERNATIONAL INDUSTRIAL EXPOSITION at Turin. Opened April 30. American Republics at the Turin Exposition, *B. P. U.*, 33:700-5.

ADHESIONS.

International Convention — circulation of automobiles. Paris, October 11, 1909.

1) Great Britain: Application to British India. *B. Usuel*, July 15.

2) France: applies to Algeria. *J. O.*, August 20.

Conventions of Third International American Conference.

Argentine. International Law, August 23, 1906.

Status of Naturalized Citizens, August 13, 1906. *B. O.*, July 28.

Central American Conventions. Guatemala City, January 10-12, 1910.

Guatemala ratified all six. *P. A. U.*, 33:651.

International Convention: Obscene Literature, Paris, May 4, 1910. Portugal, October 6.

United States, *U. S. Treaty Ser.*, 559.

Universal Postal Union.

Great Britain: Gilbert and Ellice Islands and Solomon Islands. *L'Union Postale*, 36:160.

International Radiotelegraph Convention. Berlin, November 3, 1906.

Morocco, *Monit. B.*, June 11.

Argentine, *B. O.*, October 23.

The Geneva Convention (Red Cross), July 6, 1906.

Ratifications.

- 1) Sweden. *B. Usuel*, July 11.
- 2) Portugal. *B. Usuel*, July 12.
- 3) Roumania. *B. Usuel*, August 3.

Adhesions.

- 4) Costa Rica. *B. Usuel*, August 14.
- 5) Salvador.
- 6) Honduras.

International Sanitary Convention, Paris, December 3, 1903.

- 1) Norway. *B. Usuel*, July 6.
- 2) Portugal.
- 3) Great Britain: British Indies and Zanzibar. *J. O.*, September 13.

International Bureau of Weights and Measures, May 20, 1875.

Bulgaria. *Monit. B.*, April 24-25.

International Arrangement, trade in white women, Paris, May 18, 1904.

Great Britain, for Jamaica, Sierra Leone, Somaliland, Wai-Hai-Wai, and New Zealand. *Monit. B.*, June 25.

OTIS G. STANTON.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

UNITED STATES ¹

Alsop claim. Case of United States *versus* Chile before George V. under protocol of Dec. 1, 1909. 1910. 352 p. *State Dept.*

———. Appendix. 1910. 2 v. 529, 591 pp. *State Dept.*

———. Countercase for United States. 1910. 198 p. *State Dept.*

———. Appendix. 1910. 400 p. *State Dept.*

———. Award pronounced by King George V as amiable compositeur, London, July 15, 1911. 1911. 32 p. *State Dept.*

Arbitration. Addresses of President Taft on. 1911. 66 p. *President of United States.*

Chamizal arbitration. Argument of United States before International Boundary Commission, under convention between United States and Mexico, concluded June 24, 1910. 1911. 117 p. *State Dept.*

———. Case of the United States. 1911. 45 p. *State Dept.*

———. Appendix. 1911. 2 v. 1162 p. *State Dept.*

———. Countercase of the United States, with appendix. 1911. 31 + viii + 243 p. 2 maps. [English and Spanish.] *State Dept.*

———. Minutes of Commission, June 10 and 15, 1911, containing award, dissenting opinions, and protest of agent of United States. 1911. 57 p. *State Dept.*

———. Correspondence relating to inspection of documents printed or relied on in Mexican case and countercase. 23 p. *State Dept.*

Declaration of Independence, 1776. 1911. 11 p. Paper, 5c. *State Dept.*

Fur-seal fisheries of Alaska in 1910. 40 p. *Bureau of Fisheries* doc. 749. Paper, 5c.

Fur-seal rookeries of Alaska, Special investigation of, 1910. 22 p. *Bureau of Fisheries* doc. 748. Paper, 5c.

Neutrality in war between Italy and Turkey, proclamation of. October 24, 1911. 1 p. (No. 1169.) *State Dept.*

¹ When prices are given, the document in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Panama Canal. Treaties and acts of Congress relating to isthmian canal. 1911. Paper, 5c. *Isthmian Canal Com.*

Seal islands of Alaska. Response to resolution requesting information relative to. July 19, 1911. 1232 p. il. (H. doc. 93.) Paper, 80c. *Dept. of Commerce and Labor.*

GREAT BRITAIN ²

Alsop claim, Award of George V. (Cd. 5739.) 3d.

Arbitration treaty between Great Britain and United States, signed Washington, Aug. 3, 1911. (Cd. 5805.) 1½d.

Congo, Correspondence affecting, Aug., 1910, to Oct., 1911. (Cd. 5860.) 1s. ½d.

Extradition treaty between Great Britain and Siam, signed Bangkok, March 4, 1911. (Cd. 5861.) 1d.

International Agricultural Institute, Further papers relative to. (Cd. 5962.) 4d.

Morocco, Declaration between Great Britain and France, with Secret Articles. Signed, London, April 8, 1904. (Cd. 5969.) 1d.

Naval expenditure, Return of principal Powers since 1900. (H. C. Rept. 265, Sess. 1911.) 2d.

Neutrality proclamation in Turco-Italian war, Oct. 3, 1911. (Rules and Orders, 1911, No. 959.) 1½d.

Pecuniary claims, Agreement between Great Britain and United States for settlement of, with first schedule and terms of submission. (Cd. 5803.) 1½d.

Siamese naturalization law, May 18, 1911. (Cd. 5806.) 1d.

Sleeping sickness, Agreement between Great Britain and Germany respecting, signed Berlin, Aug. 17, 1911. (Cd. 5856.) 1d.

Walfisch Bay boundary arbitration, Translation of award, with map. (Cd. 5857.) 9½d.

GEORGE A. FINCH.

² Official publications of Great Britain and many of the British colonies may be purchased of Wyman & Sons, Ltd., Fetter Lane, E. C., London, England.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF
INTERNATIONAL LAW

STATE V. GALLARDO ET AL.

(*Court of Civil Appeals of Texas. Feb. 8, 1911.*)

135 *Southwestern Reporter* 664.

Appeal from District Court, Travis County: Charles A. Wilcox, Judge.

[Statement of facts abbreviated.]

The State of Texas, acting through the Attorney-General's department, brought this suit in trespass to try title, seeking to recover two leagues of land situated in Hidalgo County, and described, in part, in plaintiff's petition as "all that part of that certain tract or parcel of land known as 'Los Ejidos' that lies on the north side of said Rio Grande River." Jose L. Gallardo and a large number of others were made defendants; the plaintiff alleging that they had unlawfully entered upon and ejected the plaintiff from the possession thereof on the 1st day of June, 1900, and had continuously since that time been in possession, receiving and enjoying the fruits, rents, and revenues arising therefrom. The case was tried before the court without a jury and final judgment rendered against the State. The State has prosecuted an appeal.

There is little, if any, conflict in the testimony, and the salient facts are as follows: In 1767 the Government of Spain granted to the town of Reynosa four leagues of land as town commons.

The town commons referred to, otherwise known as the "Ejidos," crossed the Rio Grande River, and the portion thereof that was on the north side of that stream is the land in controversy in this suit. It appears from the statement of facts that at some time prior to August 31, 1836, probably in 1801, upon the petition of the citizens of Old Reynosa, the town or municipality was by the government removed from that place to another, about six leagues away. The cause of such removal was the danger of inundation by the flood waters of the Rio Grande. After the removal referred to, and, on August 31, 1836, the alcalde of

New Reynosa addressed a letter to the governor of Tamaulipas, stating that disputes had arisen among the owners of certain lands adjacent to the "Ejidos" or commons of Old Reynosa, as to the boundaries of their respective tracts, in which letter he recommended the sale of the commons or "Ejidos" of Old Reynosa. That letter was referred to the Departmental Junta at the city of Victoria, and that body addressed a communication to the governor, recommending that the commons of Old Reynosa be reduced to private property by public sale to the highest bidder. The property was ordered sold, and in pursuance of that order the alcalde of Reynosa proceeded to sell at public auction the commons of Old Reynosa. The sale was consummated on the 9th day of November, 1836, by the acceptance of the bid of Fruto de Cardenas of \$210, which sum was paid on that day. Fruto de Cardenas, in making the purchase referred to, was acting for ninety-six inhabitants of Old Reynosa. On November 10, 1836, the alcalde who made the sale ordered that a deed of conveyance be made to the ninety-six purchasers. On the 24th day of July, 1837, the alcalde ordered the land surveyed before the issuance of title, and after the survey was made and the purchaser had paid the fees of the surveyor, which were paid September 23, 1841, a testimonio of title was issued on the 24th day of September, 1841, by the alcalde of the town of Reynosa to the ninety-six purchasers who had bid in and paid for the land. It is conceded that appellees Jose L. Gallardo and his associates claim and hold title under that sale; and the proof shows that some of them, and the ancestors under whom they claim, have been in possession of the lands so acquired, some on the Texas side and others on the Mexican side of the river, for forty or fifty years.

The case was tried on an amended petition, which does not disclose when the original petition was filed; but, as the original answer of Gallardo and his branch of the defendants was not filed until February 29, 1908, we take it for granted that the suit was commenced only a short time before that date. It is true, as contended on behalf of the State, that the uncontroverted testimony shows that the old town of Reynosa had been abandoned and the municipality by that name removed to another place. The abandonment referred to is recited in the communication from the alcalde to the Departmental Junta, and in the communication from that body to the governor, and it would seem that, as a result of the removal and abandonment referred to, the title to the land in controversy reverted to the government.

On September 26, 1871, Noberto Garza filed a petition in the District

Court of Travis county, Texas, against the State of Texas for confirmation of title to the land in controversy in this case, under the act of August 15, 1870. The Attorney-General filed an answer for the State, and on February 12, 1873, the District Court rendered judgment against the plaintiff, and thereafter the latter appealed the case to the Supreme Court, and that court rendered judgment affirming the judgment of the District Court. It was shown that the plaintiff in that case relied upon the sale of November 9, 1836, that is relied upon by the appellees in this case.

An official map of Hidalgo County, dated April, 1880, designates the land in controversy as "Los Ejidos de Reynosa." It also delineates and designates the various porciones granted to individuals and adjacent to the land in controversy. It delineates and designates the old town of Reynosa immediately across the river on the Mexican side. Another official map of the county dated April, 1896, contains substantially the same delineation and designations. It also contains certain marks, figures and letters indicating that at some time certificates had been filed on the same land. Both the maps referred to are on file in the General Land Office of this State.

This case was tried in May, 1909, and it was shown that many of the defendants, Gallardo *et al.*, had been paying taxes each upon a specified number of acres of the land, ranging from 10 to 1,500 acres, from 1883 up to the time of the trial. It is recited in the testimonio of title which was issued by the alcalde of Reynosa September 24, 1841, that the sale had been made with the consent of the departmental governor; and it seems to be conceded in the briefs of both parties that the order of sale issued October 5, 1836, was issued by order of the governor of Tamaulipas. There was testimony showing a tradition in that locality to the effect that the ancestors of the Mexican appellees had claimed and held possession of the land in controversy under the sale of November 9, 1836, from that date. There was no proof of actual occupancy at that time; but there was proof tending to show that some of the purchasers and their descendants had resided on and used the land in controversy for forty or fifty years; and it was shown that since that time, and many years ago, many other claimants under that title established their residences upon and became actual occupants of small portions of the land. In fact, the testimony shows that for many years there have been two or three villages on the land in controversy, consisting largely of claimants under the sale referred to and their families.

As required by the act of 1870, the Attorney-General of Texas filed an answer and resisted the application of Noberto Garza for confirmation of the title asserted under the sale of November 9, 1836; and, aside from the action of the Attorney-General in that respect, it was not shown that the Government of Texas has ever contested the validity of that title until this suit was instituted in 1908.

KEY, C. J. (after stating the facts as above). Speaking generally, the questions presented for decision are: First, alleged error in refusing to render final judgment in favor of appellant against the defendants who failed to answer; second, alleged error in refusing to sustain the plea of *res adjudicata*; third, alleged error in holding that the grant from the King of Spain was available as a defense; and, fourth, alleged error in holding that appellees had title available as a defense under the sale of November 9, 1836. Of course, some of these questions involve more than one question of law; but they constitute a sufficient general statement, and will now be considered in the order stated.

[Opinions on Questions 1, 2 and 3 omitted as not involving questions of international law.]

4. This narrows the case down to the question of title based upon the sale made in November, 1836. Appellant's assignments of error, as presented in its original brief, urge but one objection against that title, and that is, that it is not protected by the Treaty of Guadalupe Hidalgo, and therefore is not available as a defense. In a supplemental brief, which has been filed by permission of the court since the case was submitted, it is contended on behalf of the State, and as fundamental error: First, that from and after October 3, 1835, governors of departments, formerly States, had no authority to sell lands without the previous approval of the supreme government of Mexico; and, second, that it was not shown that the field notes of appellees' title were returned to the General Land Office of Texas on or before the 31st day of August, 1853, as required by the act of February 10, 1852 (Laws 1852, c. 69). These contentions are controverted by counsel for appellees. In determining appellees' rights based upon their purchase from the Mexican Government, and as affected by the Treaty of Guadalupe Hidalgo, it should be borne in mind that a mere change of sovereignty, even in the absence of treaty stipulations for the protection of private rights, does not divest the vested property rights of individuals. While it may be true that there is no international law, in the sense of a law interpreted and

enforced by a tribunal having authority to enforce it as between nations, yet there are certain universal usages and customs among civilized nations, founded upon such high considerations of justice that they are designated by text-books and courts as the "Law of Nations."

The Supreme Court of the United States, in *Delassus v. United States*, 9 Pet. 117, 9 L. Ed. 71, used this language:

The right of property, then, is protected and secured by the treaty; and no principle is better settled in this country than that an inchoate title to lands is property. Independent of treaty stipulation, this right would be held sacred. The sovereign who acquires an inhabited territory acquires full dominion over it; but this dominion is never supposed to divest the vested rights of individuals to property.

And in *Mitchell v. United States*, 9 Pet. 711, 9 L. Ed. 283, the same court said:

That by the law of nations, the inhabitants, citizens, or subjects of a conquered or ceded country, territory, or province, retain all the rights of property, which have not been taken from them by the orders of the conqueror, or the laws of the sovereign who acquires it by cession, and remain under their former laws, until they shall be changed.

If it be conceded that one nation has, by force, wrested territory from another, it has the power to destroy private rights in such territory by the confiscation of lands which have been acquired from the former government, still such course of conduct would be so contrary to every sense of justice as that no court should hold that such was the intention of the conquering nation, unless it was clearly and distinctly so declared by the political department of that nation. Keeping in view these principles, and assuming for the present that the sale of November 9, 1836, under which appellees claim title, was made by the proper officer and under proper authority, in so far as the Mexican Government was concerned, then upon what ground should the courts of Texas refuse to sustain that title? Counsel for the State have cited decisions of the Supreme Court of the United States, alleged to support the proposition that the guaranties of property rights contained in the body of the Treaty of Guadalupe Hidalgo were not intended to have any bearing upon title to property situated within the borders of Texas. And they make the further contention that the title under consideration is not protected by the protocol to the treaty, because it is therein stated that, while in striking out the tenth article of the treaty as originally presented the United States did not intend to annul the grants of land made by

Mexico in the ceded territories, still it is further stated that, conformably to the law of the United States, legitimate titles are those which were legitimate titles under the Mexican law in Texas up to the 2d of March, 1836. The clause referred to reads as follows:

The American Government by suppressing the tenth article of the treaty of Guadalupe did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess, and the grantees may cause their legitimate (titles) to be acknowledged before the American tribunals. Conformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territories, are those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th of May, 1846, and in Texas up to the 2nd of March, 1836.

Counsel for appellant seem to contend that this clause in the protocol should be construed as establishing the proposition of law that unless a grant from the Mexican Government to land situated in Texas was issued on or before the 2d of March, 1836, or was based upon an equity existing prior to that date, such title should not be upheld by either the political or judicial department of either the United States or of Texas. To the mind of the writer it is not clear that the clause referred to was intended to do more than declare the views of the United States Government, and to indicate what would be its policy as to territory formerly owned by the Mexican Government, and ceded by that treaty to the United States Government. That at the time the treaty was made it was the understanding of the United States Government that it was not its province to undertake by treaty with Mexico to deal with and regulate titles in Texas is shown by the message of President Polk in submitting the Treaty of Guadalupe Hidalgo to the Senate for confirmation, and in which he recommended that the tenth article of the treaty as then submitted by Mexico be stricken out, which recommendation was unanimously adopted by the Senate. In that message the President said:

To the tenth article of the treaty there are serious objections, and no instructions given to Mr. Trist contemplated or authorized its insertion. The public lands within the limits of Texas belonged to that state, and this government has no power to dispose of them, or to change the condition of grants already made. All valid titles to lands within the other territories ceded to the United States will remain unaffected by the change of sovereignty; and I therefore submit that this article should not be ratified as a part of the treaty.

The article stricken out undertook to deal with Mexican land titles in Texas, and the fact that it was stricken out, presumably for the reasons assigned by the President, affords strong proof that it was not the intention of the Government of the United States in making the treaty, or in the explanatory protocol to declare any rule of law by which the courts of Texas should determine the rights of individuals claiming lands in Texas under grants from Spain or Mexico. In fact in *McKinney v. Sariego*, 18 How. 235, 15 L. Ed. 365, and *Basse v. City of Brownsville*, 154 U. S. 610, 14 Sup. Ct. 1195, 22 L. Ed. 420, the Supreme Court of the United States seems to have held that the Treaty of Guadalupe Hidalgo had no relation to and did not affect property rights included within the State of Texas. In the former case, in construing the eighth article of the treaty, which makes provision for the protection of Mexicans and property rights in "territories formerly belonging to Mexico," it was held that the territories referred to had reference only to such territory as belonged to Mexico immediately before the making of the treaty in 1848, which territory was by force of the treaty, ceded to the United States, and that it was not intended by the language used to include territory within the limits of Texas. That decision was approved and followed in the other case cited, and, if they were to be followed by the Texas courts, then it seems to the writer, speaking for himself only, that the protocol of the treaty can have no bearing in determining the validity of any titles in Texas, because the clause wherein Texas is mentioned is manifestly limited by its own terms to grants of lands made by Mexico in the ceded territories. Now, since the United States has acquiesced in the contention of Texas that its boundaries extended to the Rio Grande River and included the land here in controversy, then it would seem that that territory was not ceded to the Government of the United States by the treaty. Therefore it seems to me that, if the question is not already concluded by former decisions of the Supreme Court of this State, the validity of the title under consideration should be determined without reference to any provision of the treaty referred to, and according to the laws and usages of nations applicable to grants made by a former government. However, this view has not heretofore prevailed in Texas, and our Supreme Court, as well as those of less authority, have considered the Treaty of Gaudalupe Hidalgo as applying to Spanish and Mexican grants in Texas. But we have been cited to no decision which holds that the effect of the protocol or any other portion of that instrument was to strike down and prevent the courts from upholding every title which had its origin after the 2d of

March, 1836. Certainly no more importance can be attached to that date in determining the question of the validity of grants in Texas than to the 13th of May, 1846, the other date specified in the protocol in reference to former grants in California and New Mexico; and yet titles issued in California after that date and prior to the 7th day of July, 1846, when the United States army took possession of that territory, have been sustained by the federal authorities. *Stearns v. United States*, 73 U. S. 594, 18 L. Ed. 843; *Hornsby v. United States*, 10 Wall. 224, 19 L. Ed. 900; *More v. Steinbach*, 127 U. S. 70, 8 Sup. Ct. 1067, 32 L. Ed. 51; *United States v. Pena*, 175 U. S. 509, 20 Sup. Ct. 165, 44 L. Ed. 251. And the Supreme Court of Texas in *Haynes v. State*, 100 Tex. 426, 100 S. W. 912, held that a grant based upon a right which originated prior to the 19th day of December, 1836, was entitled to protection by the Treaty of Guadalupe Hidalgo.

The legislature of this State, the political department of the State government, in enacting the statute of 1860 and re-enacting it in 1870, providing for the confirmation of land titles in the territory of which the land in controversy is a part, authorized the confirmation of titles that were issued prior to the 19th day of December, 1836; that being the day upon which the Congress of the Republic of Texas enacted a law declaring that the Rio Grande River should constitute the boundary of Texas on the southwest. Laws 1836, p. 133. That legislation indicates that it was not the purpose of the political department of Texas to strike down and refuse to give countenance to every claim of land emanating from the Government of Mexico which had its origin subsequent to the 2d of March, 1836. In view of this action by the legislative department of the State, when a Mexican title is asserted in the courts, not acting as special tribunals for the confirmation of titles under regulations prescribed by statute, but considering the law of nations, and all other laws applicable, should the courts lag behind the legislative department and adopt harsh constructions in order to defeat such titles? On the contrary, is it not more in accord with justice and sound public policy when, in the midst of conflicts between nations and governments, individuals, acting in good faith, have acquired rights under a *de facto* government that the courts of a succeeding government, as well as its political department, should render all reasonable aid in support of such rights?

In order to determine the merits of the title now under consideration, it is proper to consider the political situation at the time that title was acquired. Only a short time before that date Texas was a political de-

partment of Mexico. The majority of her inhabitants, for reasons entirely sufficient, organized a revolution, which was carried to ultimate success by the defeat of the Mexican army and the capture of its general, who was also the President of Mexico, at the battle of San Jacinto on the 21st day of April, 1836. Up to that time, according to the weight of historical authority, the territory known as Texas was bounded on the south by the Nueces river, and was contiguous to the state or department of Tamaulipas in Mexico. See discussion of Boundary of Texas, in volume 17, p. 98, of the *American Nation*, a history, by Dr. Geo. P. Garrison, late professor of history in the University of Texas; also discussion of the same subject by I. J. Cox, page 81 of volume 6, *Texas Historical Quarterly*; also, *Fulmore's Geographical Map of Texas*.

In May, 1836, President Burnett and his cabinet, acting for Texas, and Gen. Santa Anna, who was then a prisoner of war, purporting to act for Mexico, signed two treaties, in one of which it was stipulated that the Mexican army should be withdrawn from Texas, and should go beyond the Rio Grande; and in the other it was stipulated that another treaty should be entered into at a subsequent date for the purpose, among others, of determining the limits of the two governments. Those treaties were subsequently repudiated by Mexico and Santa Anna; but if they were valid they did not determine, but left for future determination, the question of boundary between Texas and Mexico. In *State v. Sais*, 47 Tex. 309, it was declared by the Supreme Court, speaking through Chief Justice Roberts, that:

The portion of Texas situated between the Rio Grande and Nueces rivers south of a line drawn from the northern boundary of Webb county to the mouth of Moros creek on the Nueces river was originally a part of the State of Tamaulipas in Mexico, whose capital was Victoria, some distance west of the Rio Grande. That the section of country was sparsely settled and was used principally for stock ranches; that it had long been subject to frequent depredations from savage Indians. On the 19th of December, 1836, an act of Congress of Texas was passed, defining the boundaries of Texas, in which that territory was included. Notwithstanding that, however, the State of Texas exercised no permanent jurisdiction over it, except along and near the Nueces river, including Corpus Christi on the Gulf, and the State of Tamaulipas exercised jurisdiction on and near the Rio Grande on the eastern side of it, until after the annexation of Texas to the United States, on the 29th of December, 1845, shortly after which armed occupation of the disputed territory was taken by the United States on behalf of Texas, since which time Texas has exercised jurisdiction over it.

Authentic history seems to support the statement there made, and such being the case, the status of the title under consideration seems to be this:

Prior to 1836 the boundary of Texas was the Neuces River, and Texas made no official claim of boundaries that would include any part of Tamaulipas until December 19, 1836, when her Congress declared that her boundaries extended to the Rio Grande River. Prior to that time and on November 9, 1836, the State of Tamaulipas, the government in possession and exercising jurisdiction over the land in question, sold it to those under whom the appellees claim, and on that day received the purchase money. Thereafter, in September, 1841, and before the asserted claim of Texas had been made good by actual occupancy of the United States army on behalf of Texas, the Mexican Government, in confirmation of the sale previously made, issued the formal grant vesting title in the purchasers. Such being the facts, and considering the protocol to the treaty as applying to this case, we are of opinion that, if the title is good in other respects, the courts should not refuse to uphold it because of the treaty stipulation referred to. The sale was made before Texas had officially asserted any claim to the territory which embraces this land; and, while the formal grant was not issued until after that claim had been asserted by Texas, it was issued while the Mexican Government was in actual possession and exercising actual jurisdiction over the land in question; and in the forum of conscience no reason can be assigned why the title should not be sustained. In other words, the territory in question was not in fact and law any part of the State of Texas until the claim of Texas had been made good by actual possession of the United States army and actual ouster of the possession and jurisdiction of the Mexican Government, which did not occur until after the issuance of the final title. According to the laws and usages of nations, such a claim constitutes a valid title, which is not affected by a mere change of sovereignty. It may be conceded that the legislative department of the government could have enacted a law requiring such titles to be proved up and confirmed within a given time, and prescribed that a failure to procure such confirmation would render such titles null and void. But the legislature of the State has not seen proper to pursue that course, and the courts have no right to prescribe such penalty.

[Opinion on question as to whether the governor of Tamaulipas had authority to make sale, which the court held should be presumed, omitted as involving question of municipal law.]

* * * * *

This case has been given long and careful consideration, and our conclusion is that the trial court decided it correctly.

FABER V. UNITED STATES.

Supreme Court of the United States.

[May 29, 1911.]

This case raises the question as to whether Cuban imports are entitled to a reduction of twenty per cent upon the rates charged on goods coming from the Philippine Islands, or only twenty per cent upon the regular tariff rates on goods imported from foreign countries.

The Tariff Act of July 24, 1897, lays a duty on cigars of \$4.50 per pound and twenty-five per cent ad valorem.

The Act of March 8, 1902, to raise revenue for the Philippine Islands, provides that there shall be levied, collected and paid upon all articles coming into the United States from the Philippine Archipelago the rates of duty which are required to be collected and paid upon like articles imported from foreign countries; provided "that upon all articles the growth and product of the Philippine Archipelago *coming into the United States from the Philippine Archipelago there shall be levied, collected and paid only seventy-five per centum of the rates of duty aforesaid.* * * * All duties and taxes collected in the United States on articles coming from the Philippine Archipelago * * * shall not be covered into the general fund of the Treasury of the United States, but shall be held as a separate fund and paid into the Treasury of the Philippine Islands to be used and expended for the government and benefit of said islands." (32 Stat. 54; 5 Fed. Stat. Ann. 716.)

The Commercial Convention with Cuba, proclaimed December 17, 1903 (33 Stat. 2136), declares, in Article 2, "that during the term of this convention all merchandise * * * being the product of the soil or industry of the Republic of Cuba imported into the United States shall be admitted at a reduction of twenty per centum of the rates of duty thereon, as provided by the tariff act of the United States, approved July 24, 1897, or as may be provided by any tariff law of the United States subsequently enacted."

Article 8 provides that "*the rates of duty herein granted by the United States to the Republic of Cuba are and shall continue during the term of this convention preferential in respect to all like imports from other countries, and, in return for said preferential rates of duty granted to the Republic of Cuba by the United States, it is agreed that the concession herein granted on the part of the said Republic of Cuba to the products of the United States shall likewise be, and shall continue, during*

the term of this convention, preferential in respect to all like imports from other countries."

In April, 1906, the convention and statutes above referred to being of force, the plaintiffs imported cigars and alcohol into the United States from Cuba. He contended that under the convention he could only be required to pay a duty twenty per cent less than that collected on tobacco coming into the United States from Philippine Islands which paid seventy-five per cent of the regular rate under the Tariff Act of July, 1897. He also claimed that he should not be required to pay twenty per cent less than the regular tariff on alcohol, but twenty per cent less than special rates allowed on importations of alcohol from France, Germany, Italy and Portugal.

His claim being disallowed he paid, under protest, a duty of twenty per cent less than the tariff rate on cigars and alcohol. On a hearing by the Board of Appraisers his protest was overruled. That judgment was affirmed by the Circuit Court (157 Fed. 140) and the case was brought here.

Mr. Justice LAMAR, after making the foregoing statement, delivered the opinion of the court.

Article 2 of the Convention with Cuba provides that the products of that island shall be admitted into the United States at a reduction of twenty per cent of the rates of duty in the tariff of 1897, or tariff laws subsequently enacted. There is much force in the suggestion that the reduction is limited to the rates of duty in general tariff acts, and does not apply to special rates under special agreements with other countries. *Whitney v. Robertson*, 124 U. S. 190. This point, however, we purposely leave open and limit our consideration to the principal question discussed in the brief, whether the Philippine Islands are "another country" within the meaning of the 8th article of the Cuban treaty, providing that the rates therein granted shall continue "preferential in respect to all like imports from other countries."

This treaty was signed and proclaimed several years after it had been decided, in the Insular cases, that Porto Rico and the Philippine Islands were not foreign countries, but territory of the United States, subject to such laws as Congress might enact for their political and fiscal management. In 1901 this court, in *Fourteen Diamond Rings v. The United States*, 183 U. S. 177, said that "the theory that a country remains foreign in respect to the tariff laws, until Congress has acted by embracing

it within the Customs Union, presupposes that the country may be domestic for one purpose and foreign for another." That case and *DeLima v. Bidwell*, 182 U. S. 1; *United States v. Heinzen*, 206 U. S. 370; *Dooley v. United States*, 183 U. S. 151, show that, notwithstanding their geographical remoteness, the Philippines are not a foreign country, and, if so, not "another country" within the meaning of the Cuban treaty.

There have been statutes in which the language indicated an intent to make a distinction between a country and its colonies. But in the absence of some qualifying phrase "the word country in the revenue laws of the United States has always been construed to embrace all the possessions of a foreign state, however widely separated, which are subject to the same supreme executive and legislative control." *Stairs v. Peaslee*, 18 How. 521, 526. If, therefore, in our revenue laws, a colony is treated as a part of the country to which it belongs, the Philippine Islands must be treated as a part of this nation and not as another country. It must be presumed that the words "other country" in the Cuban treaty were used according to their known and established interpretation, *Ibid*, and did not refer to charges on shipments from territory belonging to the United States. That they were not so regarded appears from the language of the Act of March 8, 1902, which studiously avoids using the words "imports," and enacts that upon articles "*coming into* the United States from the Philippine Archipelago," there shall be levied only seventy-five per cent of the rates of duty imposed on like articles imported from foreign countries. These duties, when collected, are not covered into the Treasury of the United States, but are to be used and expended solely for the use and government of the Philippine Islands.

But it is argued that even if the United States understood that the Philippine Islands to be a part of this country, Cuba could not be expected to understand that the words "other countries" did not include the Philippines if a duty was in fact charged on goods coming from those islands.

But the 8th article refers to "imports" — the correlative of "exports." This necessarily related to shipments from a country which was foreign to the United States. *Pittsburgh Coal Co. v. Louisiana*, 156 U. S. 600; *Patapsco Co. v. North Carolina*, 171 U. S. 353. The provision that the rates granted to Cuba shall continue "preferential in respect to all like imports from other countries," do not relate to charges on shipments between places under the same flag, but to duties laid on shipments — on

imports — from countries which are foreign to the United States. Both in the light of our own legislation and in view of the generally accepted interpretation of the word "imports," the 8th article of the treaty can not be construed to have been intended to give to Cuba an advantage over shipments of merchandise coming into the United States from a part of its own territory, where the collections were in part made as a means for raising revenue for the support of the government of the Philippine Islands. Cuba was given a preferential of twenty per cent over tariff rates on imports from countries which are foreign to the United States.

We make no ruling as to the duty to be charged on alcohol, because in the brief of the Government it is said that without conceding plaintiff's contention to be sound, and for reasons unnecessary to state, it consents to a reversal of so much of the judgment as relates to alcohol. It will be so ordered. The judgment of the Circuit Court as to the rate of duty on cigars is affirmed.

AWARD OF THE TRIBUNAL OF ARBITRATION CONSTITUTED UNDER THE
TREATY CONCLUDED AT WASHINGTON, THE 29TH OF FEBRUARY, 1892,
BETWEEN THE UNITED STATES OF AMERICA AND HER MAJESTY THE
QUEEN OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND

Paris, August 15, 1893

Whereas by a treaty between the United States of America and Great Britain, signed at Washington, February 29, 1892, the ratifications of which by the governments of the two countries were exchanged at London on May the 7th, 1892, it was, amongst other things, agreed and concluded that the questions which had arisen between the Government of the United States of America and the Government of Her Britannic Majesty, concerning the jurisdictional rights of the United States in the waters of Behring's Sea, and concerning also the preservation of the fur-seal in or habitually resorting to the said sea, and the rights of the citizens and subjects of either country as regards the taking of fur-seals in or habitually resorting to the said waters, should be submitted to a tribunal of arbitration to be composed of seven arbitrators, who should be appointed in the following manner, that is to say: two should be named by the President of the United States; two should be named by Her Britannic Majesty; His Excellency the President of the French

Republic should be jointly requested by the high contracting parties to name one; His Majesty the King of Italy should be so requested to name one; His Majesty the King of Sweden and Norway should be so requested to name one; the seven arbitrators to be so named should be jurists of distinguished reputation in their respective countries, and the selecting Powers should be requested to choose, if possible, jurists who are acquainted with the English language;

And whereas it was further agreed by Article II of the said treaty that the arbitrators should meet at Paris within twenty days after the delivery of the counter-cases mentioned in Article IV, and should proceed impartially and carefully to examine and decide the questions which had been or should be laid before them as in the said treaty provided on the part of the Governments of the United States and of Her Britannic Majesty respectively, and that all questions considered by the tribunal, including the final decision, should be determined by a majority of all the arbitrators;

And whereas by Article VI of the said treaty, it was further provided as follows:

In deciding the matters submitted to the said arbitrators, it is agreed that the following five points shall be submitted to them in order that their award shall embrace a distinct decision upon each of said five points, to wit:

1. What exclusive jurisdiction in the sea now known as the Behring's Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

2. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

3. Was the body of water now known as the Behring's Sea included in the phrase *Pacific Ocean*, as used in the Treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring's Sea were held and exclusively exercised by Russia after said treaty?

4. Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring's Sea east of the water boundary, in the treaty between the United States and Russia of the 30th of March 1867, pass unimpaired to the United States under that treaty?

5. Has the United States any right, and if so, what right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit?

And whereas, by Article VII of the said treaty, it was further agreed as follows:

If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence

of Great Britain is necessary to the establishment of regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the arbitrators shall then determine what concurrent regulations, outside the jurisdictional limits of the respective governments, are necessary, and over what waters such regulations, should extend;

The high contracting parties furthermore agree to cooperate in securing the adhesion of other Powers to such regulations;

And whereas, by Article VIII of the said treaty, after reciting that the high contracting parties had found themselves unable to agree upon a reference which should include the question of the liability of each for the injuries alleged to have been sustained by the other, or by its citizens, in connection with the claims presented and urged by it, and that "they were solicitous that this subordinate question should not interrupt or longer delay the submission and determination of the main questions," the high contracting parties agreed that "either of them might submit to the arbitrators any question of fact involved in said claims and ask for a finding thereon, the question of the liability of either government upon the facts found, to be the subject of further negotiation;"

And whereas the President of the United States of America named the Honorable John M. Harlan, Justice of the Supreme Court of the United States, and the Honorable John T. Morgan, Senator of the United States, to be two of the said arbitrators, and Her Britannic Majesty named the Right Honorable Lord Hannen and the Honorable Sir John Thompson, Minister of Justice and Attorney General for Canada, to be two of the said arbitrators, and His Excellency the President of the French Republic named the Baron de Courcel, Senator, Ambassador of France, to be one of the said arbitrators, and His Majesty the King of Italy named the Marquis Emilio Visconti Venosta, former Minister of Foreign Affairs and Senator of the Kingdom of Italy, to be one of the said arbitrators, and His Majesty the King of Sweden and Norway named Mr. Gregers Gram, Minister of State, to be one of the said arbitrators.

And whereas, we, the said arbitrators, so named and appointed, having taken upon ourselves the burden of the said arbitration, and having duly met at Paris, proceeded impartially and carefully to examine and decide all the questions submitted to us the said arbitrators, under the said treaty, or laid before us as provided in the said treaty on the part of the Governments of Her Britannic Majesty and the United States respectively:

Now we, the said arbitrators, having impartially and carefully examined the said questions, do in like manner by this our award decide and determine the said questions in the manner following, that is to say, we decide and determine as to the five points mentioned in Article VI as to which our award is to embrace a distinct decision upon each of them:

As to the first of the said five points, we, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine as follows:

By the ukase of 1821, Russia claimed jurisdiction in the sea now known as the Behring's Sea, to the extent of 100 Italian miles from the coasts and islands belonging to her, but, in the course of the negotiations which led to the conclusion of the treaties of 1824 with the United States and of 1825 with Great Britain, Russia admitted that her jurisdiction in the said sea should be restricted to the reach of cannon shot from shore, and it appears that, from that time up to the time of the cession of Alaska to the United States, Russia never asserted in fact or exercised any exclusive jurisdiction in Behring's Sea or any exclusive rights in the seal fisheries therein beyond the ordinary limit of territorial waters.

As to the second of the said five points, we, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine that Great Britain did not recognize or concede any claim, upon the part of Russia, to exclusive jurisdiction as to the seal fisheries in Behring Sea, outside of ordinary territorial waters.

As to the third of the said five points, as to so much thereof as requires us to decide whether the body of water now known as the Behring Sea was included in the phrase "Pacific Ocean" as used in the treaty of 1825 between Great Britain and Russia, we, the said arbitrators, do unanimously decide and determine that the body of water now known as the Behring Sea was included in the phrase "Pacific Ocean" as used in the said treaty.

And as to so much of the said third point as requires us to decide what rights, if any, in the Behring Sea were held and exclusively exercised by Russia after the said treaty of 1825, we, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine that no exclusive rights of jurisdiction in

Behring Sea and no exclusive rights as to the seal fisheries therein, were held or exercised by Russia outside of ordinary territorial waters after the treaty of 1825.

As to the fourth of the said five points, we, the said arbitrators, do unanimously decide and determine that all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring Sea, east of the water boundary, in the treaty between the United States and Russia of the 30th March 1867, did pass unimpaired to the United States under the said treaty.

As to the fifth of the said five points, we, the said Baron de Courcel, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta and Mr. Gregers Gram being a majority of the said arbitrators, do decide and determine that the United States has not any right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit.

And whereas the aforesaid determination of the foregoing questions as to the exclusive jurisdiction of the United States mentioned in Article VI leaves the subject in such a position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and preservation of the fur-seal in or habitually resorting to the Behring Sea, the tribunal having decided by a majority as to each article of the following regulations, we, the said Baron de Courcel, Lord Hannen, Marquis Visconti Venosta, and Mr. Gregers Gram, assenting to the whole of the nine articles of the following regulations, and being a majority of the said arbitrators, do decide and determine in the mode provided by the treaty, that the following concurrent regulations outside the jurisdictional limits of the respective governments are necessary and that they should extend over the waters hereinafter mentioned, that is to say;

ARTICLE I.

The Governments of the United States and of Great Britain shall forbid their citizens and subjects respectively to kill, capture or pursue at any time and in any manner whatever, the animals commonly called fur seals, within a zone of sixty miles around the Pribilov Islands, inclusive of the territorial waters.

The miles mentioned in the preceding paragraph are geographical miles, of sixty to a degree of latitude.

ARTICLE II.

The two governments shall forbid their citizens and subjects respectively to kill, capture or pursue, in any manner whatever, during the season extending, each year, from the 1st of May to the 31st of July, both inclusive, the fur seals on the high sea, in the part of the Pacific Ocean, inclusive of the Behring Sea, which is situated to the north of the 35th degree of north latitude, and eastward of the 180th degree of longitude from Greenwich till it strikes the water boundary described in Article I of the treaty of 1867 between the United States and Russia, and following that line up to Behring Straits.

ARTICLE III.

During the period of time and in the waters in which the fur-seal fishing is allowed, only sailing vessels shall be permitted to carry on or take part in fur-seal fishing operations. They will however be at liberty to avail themselves of the use of such canoes or undecked boats, propelled by paddles, oars, or sails, as are in common use as fishing boats.

ARTICLE IV.

Each sailing vessel authorized to fish for fur seals must be provided with a special license issued for that purpose by its government and shall be required to carry a distinguishing flag to be prescribed by its government.

ARTICLE V.

The masters of the vessels engaged in fur-seal fishing shall enter accurately in their official log book the date and place of each fur seal fishing operation, and also the number and sex of the seals captured upon each day. These entries shall be communicated by each of the two governments to the other at the end of each fishing season.

ARTICLE VI.

The use of nets, fire arms and explosives shall be forbidden in the fur-seal fishing. This restriction shall not apply to shot guns when such fishing takes place outside of Behring's Sea, during the season when it may be lawfully carried on.

ARTICLE VII.

The two governments shall take measures to control the fitness of the men authorized to engage in fur seal fishing; these men shall have been

proved fit to handle with sufficient skill the weapons by means of which this fishing may be carried on.

ARTICLE VIII.

The regulations contained in the preceding articles shall not apply to Indians dwelling on the coasts of the territory of the United States or of Great Britain, and carrying on fur seal fishing in canoes or undecked boats not transported by or used in connection with other vessels and propelled wholly by paddles, oars or sails and manned by not more than five persons each in the way hitherto practised by the Indians, provided such Indians are not in the employment of other persons and provided that, when so hunting in canoes or undecked boats, they shall not hunt fur seals outside of territorial waters under contract for the delivery of the skins to any person.

This exception shall not be construed to affect the municipal law of either country, nor shall it extend to the waters of Behring Sea or the waters of the Aleutian Passes.

Nothing herein contained is intended to interfere with the employment of Indians as hunters or otherwise in connection with fur sealing vessels as heretofore.

ARTICLE IX.

The concurrent regulations hereby determined with a view to the protection and preservation of the fur seals, shall remain in force until they have been, in whole or in part, abolished, or modified by common agreement between the Governments of the United States and Great Britain.

The said concurrent regulations shall be submitted every five years to a new examination, so as to enable both interested governments to consider whether, in the light of past experience, there is occasion for any modification thereof.

* * * * *

[Findings of fact with reference to seizures omitted.]

And whereas each and every question which has been considered by the tribunal has been determined by a majority of all the arbitrators.

Now we, Baron de Courcel, Lord Hannen, Mr. Justice Harlan, Sir John Thompson, Senator Morgan, the Marquis Visconti Venosta, and Mr. Gregers Gram, the respective minorities not withdrawing their votes,

do declare this to be the final decision and award in writing of this tribunal in accordance with the treaty.

Made in duplicate at Paris and signed by us the fifteenth day of August in the year 1893.

And we do certify this English version thereof to be true and accurate.

ALPH. DE COURCEL
JOHN M. HARLAN
JOHN T. MORGAN
HANNEN
JNO. S. D. THOMPSON
VISCINTI VENOSTA
G. GRAM

Declarations made by the tribunal of arbitration and referred to the Governments of the United States and Great Britain for their consideration.

I.

The arbitrators declare that the concurrent regulations, as determined upon by the tribunal of arbitration, by virtue of Article VII of the treaty of the 29th of February 1892, being applicable to the high sea only, should, in their opinion, be supplemented by other regulations applicable within the limits of the sovereignty of each of the two Powers interested and to be settled by their common agreement.

II.

In view of the critical condition to which it appears certain that the race of fur-seals is now reduced in consequence of circumstances not fully known, the arbitrators think fit to recommend both governments to come to an understanding in order to prohibit any killing of fur-seals, either on land or at sea, for a period of two or three years, or at least one year, subject to such exceptions as the two governments might think proper to admit of.

Such a measure might be recurred to at occasional intervals if found beneficial.

III.

The arbitrators declare moreover that, in their opinion, the carrying out of the regulations determined upon by the tribunal of arbitration, should be assured by a system of stipulations and measures to be enacted

by the two Powers; and that the tribunal must, in consequence, leave it to the two Powers to decide upon the means for giving effect to the regulations determined upon by it.

We do certify this English version to be true and accurate and have signed the same at Paris this 15th day of August 1893.

ALPH. DE COURCEL

JOHN M. HARLAN

I approve declarations I and III

HANNEN

I approve declarations I and III

JNO. S. D. THOMPSON

JOHN T. MORGAN

VISCONTI VENOSTA

G. GRAM.

BOOK REVIEWS

Britain and Sea Law. By T. Baty, D. C. L., LL.D. London: G. Bell and Sons. 1911. viii, 112 pp.

The above volume is a criticism of the Declaration of London, the underlying idea of which is apparently that maritime international law is usage, and that in vital matters British usage is the only sound usage.

The author admits, it is true, that there is *real* dispute in certain *minor* matters, such as convoy, blockade, etc., and gracefully accords his approval to the settlements reached by the Declaration in these matters, for the reasons that "convoy has become a matter of minor importance," and that blockade "is rapidly becoming obsolete;" this notwithstanding the fact that the settlements in both cases involve departures from established British practice.

The author also recognizes a connection between blockade and the carriage of contraband, but fails to appreciate apparently that this connection is so intimate, that in all probability, no settlement of the question of blockade could have been reached independent of the settlement to be made at the same time with reference to contraband.

It would take too much time to follow in detail the author's criticisms of the articles of the Declaration relating to the destruction of neutral prizes, contraband, and continuous voyage. They convey to the writer, however, the impression that the author is firm in the conviction that here there is no real dispute. Ideas may differ, but the differences are apparent, not real. None but British ideas have ever been carried into practice, usage is the only basis of "Sea Law," British usage is the law, and is immutable.

The discussions at the Hague Conference of 1907, and at the London Conference of 1908, make it evident, however, that there is real dispute in regard to these matters as well as in regard to the questions of convoy and blockade, unless, indeed, the author's contention that practice is the only basis of Sea Law, and that Sea Law is unchangeable, is accepted. Can this contention be admitted?

Recognizing, as one must, that British usage, as set forth in the able decisions of the British prize courts, has had a most important, if not dominant, influence in the development of international maritime law, must it not also be admitted that behind usage there are certain basic

principles of justice and equity which must, and eventually do, govern, that what is just and equitable under the conditions of to-day may be manifestly unjust twenty, fifty, or a hundred years hence, that when usage, no matter how well established, is or becomes unjust, then usage must and eventually does change to conform to justice? In fact, the history of the development of maritime law is but a repetition of illustrations of this fundamental principle; the Hague Convention for the creation of an International Prize Court being a notable recent instance, in that it takes from the courts of the captor the final determination of prize cases, thus changing an established practice the justice of which has been subject to much and increasing criticism.

As to the desirableness of the International Prize Court, opinions may differ, but if the court is to be established the necessity for a clear definition of the law and the principles which the court is to apply in the determination of the cases brought before it, is obvious. This was the purpose of the London Conference, that the Declaration of London, no matter to what extent it may run counter to individual opinion, was the best solution attainable of the difficult question before the conference, can hardly be doubted.

In closing this comment, its writer ventures the opinion that to the majority of those who have followed closely the discussions of the London Conference of 1908 and the Hague Conference of 1907, "Britain and Sea Law" will be a convincing argument in favor of the Declaration of London, however contrary this may be to the intention of its author.

JOHN P. MERRELL.

The Panama Canal. By Harmodio Arias. London: P. S. King and Son. 1911. xiv, 188 pp.

In a subtitle this small volume accurately describes itself as "a study in international law and diplomacy." Part I, entitled "The United States and the interoceanic canal," presents in its first four chapters a useful account of the long diplomatic history which is now culminating in the building of the canal by the United States. The fifth chapter of that part deals with the Monroe Doctrine, and indicates, as do other passages, that the author considers that doctrine an occasional instrument for aggrandizement. Part II, dealing with "The juridical position of the Panama Canal," after explaining the indefiniteness of the word "neutralization," and demonstrating that in some sense the canal is certainly "neutral" — as, indeed, all the treaties dealing with the matter

say — reaches the opinion, in the fifth chapter, that the United States, in accordance with the general principles as to neutralization, has a right to construct and maintain fortifications for the purpose of defending the canal from destruction or attack. This opinion is worked out with great clearness, thus:

The state, person, or thing neutralized is entitled to enjoy the benefit of peace, but, on the other hand, is burdened with the corresponding obligation of not taking part in a war. It is clear that the non-belligerent idea is the essential characteristic of the nation. But, obviously enough, the right of self-defense is reserved. * * * Law can not discourage self-help, for then the law-abiding members of the community would be at the entire mercy of wrongdoers. Neutralization, then, can not take away the right of self-defense. It is well known that Belgium and Switzerland are permanently neutralized, and that nevertheless they are ready to defend their integrity by well-organized armies. * * * The presence of regular armies in Belgium and Switzerland should not be taken to mean that they are to be made use of for offensive purposes. Undoubtedly arms may be instruments of attack or of protection, but the former alternative ought not to be the first to be taken into consideration when there is an international agreement that forbids offensive measures. Now, passing from the question of the presence of armies in a neutralized region to that of fortifications, one would feel bound to assert that the analogy is real, and that the logical consequences that can be drawn from it are well based, and, therefore, convincing. Belligerent organizations, such as armies, are, indeed, more likely to be used for offensive purposes than fortifications, for the simple reason that the former are capable of movement while the latter are fixed, and, therefore, can not come into action unless they happen to be in the scene of battle. International law allows the existence of war implements and armies in neutralized regions. *Prima facie* the presence of military elements in a place would seem to be incompatible with its non-belligerent character, but a little consideration on the conception of self-defense necessarily shows that no contradiction or inconsistency occurs.

It is easy, of course, to say that, whatever the general theory of neutralization may be, the United States has by treaty the express authority for fortifying; but it is interesting, nevertheless, to have this idea demonstrated, that neutralization and fortification are harmonious. Happily, the author's opinion as to this matter is shown to be brought to pass by queries and not by prejudice; for throughout the volume there are occasional twists of phrase indicating that the twists of mind are not unreasonably favorable to the United States. For the benefit of any reader who wishes to conduct investigations for himself, the volume gives an adequate bibliography and reprints the important treaties.

EUGENE WAMBAUGH.

A Manual of International Law; for the use of Naval Officers. By Rear Admiral C. H. Stockton, U. S. N. Annapolis: Naval Institute, 1911. 313 pp.

The manual before us represents the experience gained in the practice of international law by its author during a long and especially useful career as an officer of the United States Navy; a career which may be said to have culminated in his fortunate incumbency of the office of Superintendent of the Naval War College at Newport, Rhode Island. There is no place, certainly in the United States, where instruction in international law is carried on with such systematic thoroughness, or where better or more practical results are obtained, and this is due, in great part, to the intelligent and well-directed endeavors to that end which were put forth by Admiral Stockton, and by Professors Snow and Wilson who cooperated with him in the establishment of the school upon its present basis. A notion of the extent and character of the work done at the War College may be obtained from the annual volumes of its Proceedings — a work of standard and permanent value.

The manual is primarily intended for the use of naval officers, as is indicated by its title. The book is not quite equally divided between peace and war; a comparatively full presentation of the former being necessary in the discussion of the subjects of territory, including boundaries, insurgency in its relation to belligerency, jurisdiction on the high seas and nationality, all of which are of the first importance to officers of the Navy. In the portion devoted to war, belligerency, neutrality, maritime capture, blockade, contraband, the right of search and un-neutral service are all of them thoroughly and lucidly discussed in the light of the most recent authorities. The old rules of maritime capture, which have recently been made the subject of conventional amendment, are brought fully up to date; the most recent of these, the Convention of London of 1907, is treated in great detail and at sufficient length. This is as it should be, for that convention, if generally and fully adopted and followed, is calculated to bring about very material changes in the practice of maritime warfare.

It was an earlier American author, the late Major General Halleck, whose work on international law was required to be carried on board every public armed vessel in the British Navy. It is fortunate, indeed, that Admiral Stockton's excellent work on the same subject is to occupy a similar place in the Navy of the United States. For that purpose a better selection could not possibly have been made.

GEO. B. DAVIS.

Boundaries. A Contribution to the Study of American International Law. By Hugo D. Barbagelata. Paris. 1911.

[Translation.*]

Until recent years no study of what may be called, strictly speaking, "American international law," had been attempted. The expression, it is true, was in use. But it was taken in quite a different sense from that which is at the present day given it. By it we understand, indeed, at the present time, among other subjects which need not occupy us here, the international problems and situations peculiar to the new continent.¹

This study of American International Law, in the sense now given it, tends from day to day to draw greater attention to it. The monograph of Mr. Barbagelata on "Boundaries," written as a thesis for a diploma in the School of Political Science, is a proof of this.

The subject chosen is a very interesting one: it has dominated, in fact, the entire foreign policy of all the states of the new world during the course of the nineteenth century. What rules have been observed in the delimitation of their boundaries? Have they merely had recourse to the ordinary rules of international law, or have they, on the contrary, sought for and followed a special rule, more in harmony with the principles peculiar to America? Such is the question which the new world has had to solve.

The states of Latin America, being all of them, with the exception of Brazil, former colonies of the same mother-country, and having proclaimed their independence at about the same period, and at the same time having set themselves up as separate nations, the problem of the delimitation of their respective boundaries became a peculiarly delicate one. If the states of America on becoming independent broke off entirely their past relations with Spain, they nevertheless preserved the former administrative divisions. The latter, from having up to that time marked the several provinces of the colonial empire of Spain, thereafter served to define the territory of the new states. This adaptation was brought about without conflict, and with the consent, if not expressed, at least tacit, of the states, except in certain boundary regions of Colombia, Ecuador and Peru.

At the time of their independence, these states were in perfect accord

* By Mr. Chas. G. Fenwick, of Washington, D. C.

¹ See Alvarez, *Le Droit International Américain*, Paris, 1910, p. 10 and following.

on the point of making their administrative divisions national boundaries, and they agreed whether expressly by treaty, or tacitly, to adopt in fact a rule of delimitation absolutely unknown to international law, but perfectly logical and answering to the necessities of the situation. This rule is called the *Uti Possidetis* of 1810.

This very simple rule has been at the same time the source of difficulties between the states, as is evident when we remember that the former administrative divisions were almost always lacking in definiteness. The result is that boundary questions may be classed among the most important points of American international law. Let us see how Mr. Barbagelata regards these questions of *uti possidetis*.

After a rapid examination of the cases in which the rule of *uti possidetis* has not been applied, the author concludes that it is "a principle of little practical value, and embarrassing rather than useful in the solution of the countless boundary questions which arise so frequently between the various states of Latin America." [Page 3.] This opinion indicates, in our opinion, a confusion with regard to two very different matters. A distinction must be made, indeed, between the rule according to which the delimitation is made, and the more or less practical import which may be attributed to it. As regards the rule itself, there is no room for doubt. Diplomatic history goes to show that, with certain exceptions which do not destroy the rule, the rule of *uti possidetis* has, indeed, been the basis chosen for the carrying out of these delimitations. It is hardly in place here to enumerate the various cases in which the rule has been proclaimed or followed. On the contrary, it is important to note the cases in which the principle appears to have been abandoned, and these are precisely the cases which Mr. Barbagelata has made use of to support his position that the rule is indefinite. Thus the author cites in support of his assertion the agreement of confederation signed at the Congress of Lima in 1847, and in which, after having proclaimed the rule of *uti possidetis* as a principle of delimitation, Article 7 goes on to provide that

in order to determine the said delimitations in cases where they are not fixed in a natural or definite way, they (the Confederate Republics) agree that when the case shall arise the governments of the republics concerned will appoint delegates who shall meet together, and after exploring as far as possible the territory in dispute, will determine the boundary lines of the two republics by taking the watersheds, channels of rivers and other natural lines.

But this last restriction, far from being in our opinion a derogation from the rule, only goes to confirm it, for, as can be gathered from a

consideration of the act as a whole, the article in question only provides for those cases in which the rule of *uti possidetis* could not serve as a guide. Likewise the arguments which Mr. Barbagelata draws from the decrees of the Argentine Government of November 29, 1813, and of March 7 and September 10, 1814, are hardly conclusive, for these decrees have, in fact, changed or attempted to change the administrative division of certain states forming part of the United Provinces of Rio de la Plata. This does not in any way contravene the rule of *uti possidetis* since there was no question of applying it to provincial subdivisions, which became constitutional divisions after the independence of the states, but merely to the new states themselves.

One other case is cited by Mr. Barbagelata. He adds, indeed, that on the occasion of the protocol of a conference in which the delegates of Ecuador and Colombia met in order to trace the delimitations of the respective boundaries of their countries, the delegates of Ecuador protested against the application to that delimitation of the rule of *uti possidetis*. This argument does not seem to have any greater weight than the preceding ones. It can not be claimed, indeed, that the isolated and individual opinion of a single delegate will suffice to overthrow a rule which has been applied in countless cases.

To conclude, there is a last case on which Mr. Barbagelata relies, but it does not seem to us any more conclusive than the other cases. It is the decision of the King of Spain on March 16, 1891, fixing the boundaries of Colombia and Venezuela. This decision, in fact, took care to announce that its sole object was to remove the obscurity in the Royal Decree of February 19, 1786, fixing those boundaries. No better proof can be had of the value of the rule of *uti possidetis* as an American basis of delimitation.

Mr. Barbagelata claims, moreover, to find in the arbitral decisions which have been made with respect to the delimitation of the states of Central America a disregard for the rule of *uti possidetis*, but these are mere assertions which the author has not justified by citing the central point of the decisions in question.

It remains for us to consider now whether this rule of *uti possidetis*, generally followed in fact, was really a practical one.

Without doubt it was so at the period at which it was adopted, for the states had no need of any more precise delimitation, and this rule had, moreover, the advantage of harmonizing with the local sentiment which was formed in each administrative division. But it at the same time

gave rise to an inconvenience — the indefiniteness of the former administrative divisions, an indefiniteness which was the occasion of many conflicts in future times. The result is that at the present day it is scarcely admissible in the tracing of definite boundary lines, and a new rule is required for the solution of the boundary questions, which are still awaiting settlement. Arbitration has been recommended. This procedure is at the present day followed, but it must be recognized that more than once it has not worked to the full satisfaction of the parties who have had recourse to it. In order that it may work with success it is necessary that the arbiter take into consideration objective principles of real practical value. It seems to us in this connection that by taking account, in due proportion, of the popular will, of the geographic conditions of the territory, of the economic possibilities, and of the effective sovereignty exercised over them by the states, a rule will be obtained which will be at once in harmony with the demands of modern principles and with the necessities of the New World.

The work of Mr. Barbagelata, which is an important contribution to the study of the question of boundaries, contains other subjects than the rule of *uti possidetis* which it would likewise be interesting to examine. The limits of this short review unfortunately prevent us delaying longer over it.

A. ALVAREZ.

British Rights at Sea under the Declaration of London. By F. E. Bray.
London: P. S. King & Son. 1911. 99 pp. (One shilling.)

This brochure presents in a sane and intelligent manner the effect of the Declaration of London upon British rights during peace and war.

There were certain things the London Naval Conference did not accomplish, in one instance because the matter was not germane to the object of its convening, in others because no common agreement could be reached by the great naval Powers represented.

The first matter was the abolition of the capture of private property at sea. This is a matter advocated officially by the United States, but it was not a question incorporated in the subject-matter of the Conference. It is not probable that it would have received favorable action by the Conference, as all action of the Conference which went towards the formation of the Declaration of London required unanimous consent. It is possible if the matter had been presented by the United States that this country would have been seconded by Italy, Germany, Austria-

Hungary and Holland, and opposed by Great Britain, France, Spain, Japan and Russia. Of course, this would have left the matter as it was left at the Second Hague Conference, when twenty-one states voted with the United States and twenty-two either voted against or abstained from voting by absence or abstention. It may be still said that the nations of the world are in a general way equally divided upon the subject.

Of the subjects brought before the Conference as germane to the subjects of the call, but upon which no decision was reached, the first was "The Question whether Domicile or Nationality should be Accepted as the Test of Enemy Character." This is really a case of little moment, Germany laying the most stress upon it, as it wants always to retain so far as possible the nationality of absent Germans in war or peace.

The second question was that of the conversion of merchantmen into warships on the high seas. This was opposed by the United States and Great Britain as affording opportunities for future Alabamas. It was favored by Germany, whose naval policy seems linked to the distribution of merchantmen in many parts of the world, to enjoy immunity as merchantmen, but secure a ready means of transformation by proceeding upon the high seas and chameleon-like assume the rôle of a commerce destroyer. The want of conclusion as to this matter will permit such conversion for those favoring it as they claimed to do and expected to do before the Conference was called into being.

Mr. Bray, whose connection with the preliminary arrangements for the London Conference, and familiarity with its proceedings, enables him to speak with a knowledge wanting in many articles and pamphlets upon the subject, has given us a very good and clear exposition of the Conference and its resulting Declaration which will be useful not only for the "man in the street," but for many others whose pretence of knowledge is very much greater.

Concerning the accompanying report of the Drafting Committee, duly accepted by the Conference, he says:

It is the recognized Continental practice that such a document should be submitted to and accepted by, the authority which sanctions the law or treaty with which it deals. * * * The object of the report is to explain how a particular phrase or rule came to be adopted, and its existence is a valuable guarantee against an unexpected decision.

It is to be hoped that the work of Mr. Bray, though written for Great Britain, may have a circulation in this country, for although the House

of Lords has rejected the Declaration it will no doubt be resubmitted and it may become the duty of our Department of State to secure a ratification from the Senate on our part as a signatory Power.

C. H. STOCKTON.

The Law of the Air. By Harold D. Hazeltine. London: University of London Press, 1911. vi, 152 pp.

This is a publication of a series of three lectures delivered in the University of London in December, 1910. The author is fellow and law lecturer at Emanuel College, Cambridge. He has performed a valuable service in gathering the material already at hand and digesting it in logical form. Upon this he has superimposed his choice of principles. He lays great stress upon the importance of the controversy whether the state has full sovereignty in the airspace over its territory, and, in the title to his first lecture, characterizes it as the "Fundamental Problem" (pp. 1-54). He unqualifiedly favors the sovereignty theory as opposed to that of total or partial freedom, and maintains that "recognition of each state's full right of sovereignty will not be an obstacle to the proper and legitimate development of aerial navigation, while at the same time it will safeguard state and private rights and interests" (p. 51). Later in the book he again refers to "the first great and fundamental question," whether the sovereignty view shall prevail in international relations (p. 141).

We think that the author has been rather obsessed with the importance of this question. One might very well be inclined to draw away from abstract reasoning on a topic which, at best, is without much historical precedent. It has become deeply controversial, and, after all, does not of itself accomplish much in satisfying the need of a wise regulation of aerial navigation, locally and internationally, when once it has assumed sufficient importance. If maritime law were devoted principally to the discussion of the theory of how far a state could *exclude* the ships of other states from navigating coastal waters and entering ports, it would ill suit the needs of a sea-going commerce.

Dr. Hazeltine's book is, however, scholarly throughout, and shows painstaking reflection. The second lecture (pp. 54-94) deals with the "Principles and Problems of National Law," in which judicial and legislative precedents of England, the United States and the Continent relating to private rights in the airspace are reviewed. The third lecture

(pp. 95-144) is entitled "The Principles and Problems of International Law," and deals with the attitude of the Hague Conventions and the Declaration of London toward aircraft in time of war.

Publications relating to the law of the air have increased rapidly during the past year. In view of the many set-backs which the practice of aerial navigation, in its various forms, has received, one is apt to doubt whether the great amount of literary energy expended upon the subject is justified by practical needs. It was on this account that the American Bar Association at its Boston meeting in August, 1911, refused to adopt the draft bill prepared by its committee. We note that the author refers to the draft as though it had already been adopted by the association (p. 88). At the time of the first successes of the aeroplane and the dirigible balloon, or airship, very little had been written on either the national or international legal phases of control over the airspace. Undoubtedly, a clearing had to be made upon which proper legislative and administrative action could be based. From this viewpoint the book in hand is valuable. But now that the problems are defined, it would seem, to the reviewer at least, that lawyers and publicists should await a further advance in the art and a more general use of the airspace before crystalizing their researches or reflections into definite legal rules.

ARTHUR K. KUHN.

Capture in War on Land and Sea. By Hans Wehberg, Dr. Jur. Translated from *Das Beuterecht im Land und Seekriege*, with an Introduction by John M. Robertson, M. P. London: P. S. King & Son. 1911. xxxv, 210 pp.

This is a small work consisting of 191 pages of text, with an introduction of 35 pages and a careful bibliography of 9 and an index covering 8 pages, making a volume of 243 pages in all.

Both introduction and text are vigorous and trenchant attacks on militarism and imperial policies, and especially on the attitude, the dangers and necessities, of England as compared with the Continental countries in this respect.

The introduction, which is called a Historical Review, especially urges that "the argument that capture of an enemy's commerce as a means of bringing a war to an end was never a good one and is weaker now than ever."

This, it asserts, is proved by a review of English wars and treaties during the past 260 years. It particularly confutes Mr. Bowles' asser-

tions to the contrary and seeks to show that even in the French Revolutionary and Napoleonic wars the French privateers captured 410 English ships as against 316 lost by France. He seeks to show that the enormous loss of English commerce by the system of capture at sea averaged about 500 ships per year from 1804 to 1813 and that this is not mentioned in English school books; that peace has seldom or never been accelerated by naval victory; that war is most common when most cruel and unrestrained, and that thus the argument fails that the hardships of war must be insisted on as deterrents.

He says

Whom do we dream of invading? What Power fears to be invaded by us? and who, given immunity of commerce, is likely to rebuild a formidable fleet solely on the chance of invading us? Let every conceivable contingency be faced and the sanity of the abandonment of booty right with proportionate restriction of armaments becomes the more clear (p. xxxv).

Dr. Wehberg discusses the law of prize on land as to national property, railways and private property, but devotes most of his pages to arguing the necessity for abolition of the law of prize at sea. Perhaps his chapter on "England and the Law of Prize at sea, particularly in comparison with Germany" is as interesting as any portion of the work.

He seeks to show that all English ships of less than twelve knots speed would have to be laid up on the outbreak of war, and that this probably means 10,000 vessels. As to this argument the reviewer would suggest that no such result would follow if England's fleet kept control of the seas, and it sometimes seems as if Dr. Wehberg's arguments cut both ways. He argues that the English merchant marine is much more vulnerable than that of Germany; that the Hamburg-American and North German Lloyd lines are the strongest existing maritime companies, able to meet and to bear losses as no others, as is shown by their suffering nothing even from the American trust, which powerfully affected the English lines; that England is dependent mainly, both for food and raw materials of manufacture, on marine imports to an extent unknown in Germany; that interruption to her commerce means idleness and starvation for her people as was shown in the sixties when the cotton supplies were cut off by our blockade of the Southern Confederacy; that the abolition of the law of prize would therefore be overwhelmingly advantageous to England, where even in a war like that of the Crimea, when not one English ship was captured, the disturbance to trade increased the cost of wheat 50 per cent.

He says in closing:

In spite of all past failures one may, believing in the continued evolution of all humane institutions, express the hope that at no very distant date under the firm guidance of North America the Powers will pursue the course laid down for them not only by humane considerations, but also by modern conceptions of the nature of war.

The work is, of course, not a text book for reference like Bordwell's *Law of War* or a brief compendium like Phillimore's excellent monograph on booty, but a strong, learned, radical and useful (if not in all parts wholly convincing) plea for the abolition of capture in war on land and sea, and much that is presented is valuable, original and impressive. A small slip occurs on page 113 where he quotes Wheaton as an Englishman. We, in the United States, are unwilling to give him up. As an argument for the safeguarding of commerce, even in war the work must take an important place. Mr. Norman Angell has lately called attention to the way in which Germany thrives on trade relations with countries which Spain sought to win and dominate by war, while Spain languishes. The world must adjust itself more and more to peace and less and less to war, and all international codes must be revised to that end, even those of war. Successful industrial competition is plainly to be the basis of future national success and not capture on land or sea.

CHAS. N. GREGORY.

Il Significato Della Guerra Nella Scienza del Diritto Internazionale.

By Dr. Andrea Rapisardi-Mirabelli. Rome: Stabilimento Tip. Giuseppe Civelli. 1910. 72 pp. L. 3.

Dr. Rapisardi-Mirabelli in the pamphlet before us continues his series of studies in "Fundamental Questions of International Law." The subject is sufficiently indicated by the title: "The meaning of war in the Science of International Law;" always keeping in mind that the question in view is primarily one of system and classification, and that the author is bent mainly upon laying the foundations of his science broad and sure and providing against the errors that arise from a faulty scheme.

To be more precise, the question is whether a publicist constructing a system of public international law ought to deal with war as among the means of solution of international controversies and whether as such a solution it falls within the scope of the science in the same sense as

arbitration, diplomatic negotiation and other peaceful measures. The author finally answers these questions in the negative. War is a fact to which we can not close our eyes, but it is strictly an exceptional fact, to be treated as abnormal and dealt with apart, say in an appendix to the system.

The approach to the subject is, in accordance with the plan of these studies, historical. The tradition of the older writers, as we see in the very title of the great work of Grotius, placed war and peace on an equal footing as subjects of international law. A place is claimed for war under the law of nature; it is true that the conception seems to be present that some wars can hardly be brought under any law, the criterion of the justice or injustice of the war in its inception, or of *bona fide* belief in its justice is introduced, but gives little assistance towards clarifying the situation.

The idea, of course, was that war was to be considered as a means for the enforcement of legal rights not otherwise protected; but the conception immediately involves us in an inextricable maze of difficulties. The solution furnished by the issue of a war is no solution at all of any legal question in controversy. But the most important point is that, looking broadly at the matter and more particularly at modern times, it is not legal questions that lead to war, but conflicting national interests and aims. A distinction may be drawn between so called juridical controversies which arise out of the violation of a right and political controversies provoked by the conflict of interests. As a matter of fact in most modern wars, the reasons are political, while the pretexts are juridical; still the distinction is soundly based on fact and the author proceeds to draw from it certain inferences, particularly in regard to the extent to which peaceful means can be substituted for the arbitrament of war. A court of arbitration is the natural and proper means for the solution of a question arising from the violation of a right. It is ill-adapted to the settlement of a conflict of interests. Now it is the latter class of questions that gives rise to war. Even as things now are, there is little danger in controversies involving a legal right.

Running through various modern theories which seek to determine the place and office of war, the author reaches the conclusion that the right to make war is a necessary inference from the recognition of the personality of the state; but once commenced, it is idle to talk of juridical relations where force has become the deciding factor. War is a means of pursuing and attaining interests not juridically protected. The field of man's interests is always wider than that part of them which is gov-

erned by law. It may very well be possible to provide by treaty and otherwise that questions soluble by law shall no longer furnish a pretext for war, but there will still remain a wide and much more dangerous field of conflict. War is an exception, an abnormality, which can not be completely brought within the field of law.

If a word of criticism may be added, the argument does not seem to be entirely satisfactory. It may be true that a conflict of national interests and aims is something different from, and much more dangerous than a controversy based on the violation of a right. But neither party can pursue its own exclusive interests and aims very far without infringing some right of the other party. Thus the question of the violation of a right will inevitably present itself early in the difference. It is hard to see how the position of two warring nations differs essentially from that of two litigants who have come to blows in the street over the object in dispute. One may be right and the other wrong, or both may be partly right and partly wrong; in any case, the claim that the interest at stake is too important to risk the issue on a law suit, will hardly put the aggressor right in the eyes of his neighbors, nor convince them that the forms and methods of law are necessarily inadequate for the solution of the controversy.

JAMES BARCLAY.

Some plain reasons for immunity from capture of private property at sea. By Sir John Macdonnell. London: John Murray. 1910. 20 pp. Price, 3d.

In a recently published pamphlet of twenty pages, Sir John Macdonnell has given his reasons why, wholly apart from ethical and humanitarian considerations, the interests of peace in general and those of England in particular demand that the principle of immunity from capture of private property at sea should be recognized as a general rule of civilized warfare.

He places his argument squarely on the ground of practical advantage to England, and in the adoption of the principle of immunity he sees the only remedy for the reduction of the huge naval armaments which he describes as "not the least of the white man's burdens."

The principles advocated by Sir John have been, as he says in his pamphlet, logically advocated by the United States ever since 1856, when it declined to accede to the Declaration of Paris abolishing privateering and regulating blockade unless it were amended by the addition of a further provision establishing the immunity of private property.

The United States has indeed consistently and persistently advocated

the general adoption of the rule not only since 1856, but since 1783. At nearly every international conference which has had jurisdiction to consider it, the subject has been advanced, and the adoption of the principle of immunity has been urged by representatives of the United States. Presidents have constantly called the attention of Congress to the subject, and in response to a message of President Roosevelt in 1903, quoting from an earlier message of President McKinley in 1898, Congress, on April 28, 1904, by resolution, expressed the desirability of incorporating into the permanent law of civilized nations the principle of exemption of all private property at sea not contraband of war from capture or destruction by belligerents.

The United States carried its advocacy of the principle to both the Hague Conferences. At the First Conference in 1899 the subject was presented by Andrew D. White, and at the Second Conference by Joseph H. Choate. The address made by Mr. Choate is one of the notable addresses of the Second Conference. It is an historical review in clear and concise language, not only of the position taken on this subject by the United States, but of those taken by England, Germany and Russia. As the result of his forceful presentation, the vote by nations was overwhelmingly in favor of immunity. Majority votes, however, do not control in conferences of that nature, and although twenty-one of the forty-four states represented voted yea and only eleven voted nay (twelve refrained from voting), there were not a sufficient number of acquiescing states to insure unanimity, and no agreement was reached either on the principle of complete immunity or on those of assimilation to land warfare, sequestration for confiscation, or on other near-immunity principles which formed the bases of the propositions advanced by Brazil, Belgium and other Powers. Nevertheless the general result was a step forward.

Sir John Macdonnell disposes of many of the arguments advanced against exemption, notably those of use of captured vessels, and the advantage of making war as destructive as possible as an incentive both to preventing it and terminating it.

In answer to the former, Sir John says that while every vessel may indeed be a potential transport and every merchant sailor a potential effective combatant, still this is true only in the limited sense that every able-bodied subject of a belligerent is a potential soldier and every part of his property is a potential aid to his government.

As to the latter, the author of this review confesses that it has never appealed to him, although he has heard it advocated on many occasions and sometimes in all sincerity by able men, and he sees no reason for not

repeating the language he used more than a dozen years ago in a pamphlet on this very subject.

Those who would argue in favor of continuing the capture of private property on the ground that the war is more quickly concluded if more fiercely waged, must be content to follow that argument whithersoever it will lead them; for, if by this wanton destruction and consequent weakening of the enemy, war is terminated more quickly, and humanity is benefited thereby, then let us at once abolish the rules adopted by civilized nations preventing pillage, torture, rape and wholesale destruction on land as well as sea. Let us emulate the example set by Alva in the Netherlands and by the French in the Palatinate three hundred years ago: let us disregard all that has been accomplished by the great army of writers on the subject of International Law, starting from Grotius, who, in 1625, surprised the world by demonstrating that there was no paradox in regulating war by rules of humanity; let us abolish the Red Cross of Geneva and substitute some banner for warfare on land that will correspond to the piratical emblems of the cross-bones; let the prohibition of explosive bullets be abolished and all the ancient methods of warfare be reinstated.

Sir John Macdonnell moreover demonstrates that the protection of its merchant marine is such a heavy strain upon the navy that a country loses more than it gains by adhering to the principle of capture. This, he claims, is especially true of England, whose merchant ships are scattered the whole world over, thus doubly subjecting her to the enormous expense of protecting them as well as the great risk of their capture and destruction.

The world moves slowly, and it may be a long time before war is abolished either on land or on sea, but meanwhile perhaps the curse may be ameliorated if not abated, and the abrogation of the right to destroy unoffending property merely because it happens to belong to a belligerent and to be upon the sea would certainly be a step in the right direction whether induced by altruism or utilitarianism. Sir John's pamphlet is a timely warning against continuing in the wrong direction.

CHARLES HENRY BUTLER.

The Finnish Question in the Year 1911. By a Member of the Finnish Landtag. Leipzig: Duncker and Humblot. 1911. 124 pp.

[Translation.*]

The constitutional conflict, which for a long time has been dividing Finland and Russia, has called forth on all sides publications so numerous that if collected they would constitute a small library. The question has

* By Mr. Chas. G. Fenwick, of Washington, D. C.

been studied in all its aspects. The arguments before us have been set forth and considered in their minutest details. All has been said and nothing remains to be added, especially after the statement drawn up in common by a certain number of well-known jurists of western Europe, who met with that object at London in the beginning of 1910 at the home of the venerable patriarch of international law, Mr. Westlake. Their work, drawn up in French in a remarkably elegant and clear form,¹ published at the same time in German and in English, has given due weight to Russian claims and has established in a way that is at once most convincing and most forcible the justice of the Finnish cause. In its argument it possesses the force of a special plea, and in its conclusions the weight of a judicial decision. If the academy proposed by Von Bar should come to be established with the duty of pronouncing, in the name of the civilized world, judgments in international disputes, no better model could be set before it for its verdicts than that international deliberative body.

But if in the conscience of impartial statesmen the cause is henceforth heard, in actual fact the dispute remains and the battle continues. On the Russian side not only the aggressive policy persists, but it finds jurists who are ready to justify it. In a recent monograph² the Russian Professor N. Kuplewasky has endeavored to show that his Russian colleagues are in the majority convinced that the rights claimed by Finland have no foundation. He himself holds that view, thus abandoning the contrary opinion held by him a dozen years ago in another work. He explains his change of view by saying that he had not access at that time to all the documents in the case. We may hope that Mr. Kuplewasky will be reconverted, for judging from his monograph he does not appear to be even yet well informed. He seems to be unaware both of the international deliberations at London, and, what is more serious for a Russian, of the work³ in which his colleague at Moscow, Professor Th. Kokohtine, has had the courage to condemn, in the name of a misconception of justice, the conduct of his government.

It is understood, moreover, that the Finns have not ceased to denounce

¹ *Finland and Russia*. The deliberations at London, February 26th to March 1st, 1910. Paris: Pedone, 1910, and 2nd Edition, 1911, pages 79.

² *Views of 25 Russian Professors of Law on the legal position of Finland in relation to the Russian Empire*, published April, 1911. Ebering, pages 36.

³ *The Russian Cabinet and the Finnish Question*, French translation. Helsingfors, 1909, pages 26.

the injustice of which they are the victims. In spite of the support which they have received from well-known men over the entire world they thought that their silence might be taken as a sign of resignation. If they had no longer an opportunity to continue the active assertion of their rights, it seemed to them wise to place before the eyes of the enlightened public the long list of facts of which they are complaining. Such is precisely the object, modest but useful, of the monograph which I am about to analyze. Its author, who, as a member of the Finnish Diet, is in a position to obtain information at first hand, desires that his work should serve as a guide through the complexity of facts to which he wishes to direct attention concerning the present situation. It is a work purely objective in character, written with the serene calm and the gravity which alone can inspire a profound and sincere belief in law and justice.

After calling attention to the foundation of the Finnish rights in accordance with the Act of Bargo, in which on March 15-27, 1809, the Emperor Alexander the First, in uniting the Grand Duchy to his empire, solemnly guaranteed to maintain its fundamental laws; to the regular exercise since 1863 of the legislative powers of the Diet; and to the first symptoms, beginning with 1880, of the policy of Russification inspired by the hatred of the bureaucracy for the Finnish constitutional government, the author groups the facts in an arrangement exhibiting the three principal lines of combat: the legislative question; the military question; the rights of Russians domiciled in Finland.

From the legislative point of view Finnish autonomy had two organs: the Czar-Grand Duke, who alone had the right to make administrative laws, and the Diet, which legislated upon important matters with the concurrence of the monarch, whose consent had to be asked at St. Petersburg by the Finnish Secretary of State. When questions might concern at the same time the Grand Duchy and the empire as a whole, the Secretary of State before referring such questions to the monarch had to consult the proper Russian Minister. Under this arrangement the general interests of the empire were fully guaranteed by the powers of the common monarch, who, having as Grand Duke the right of legislative approval, could prevent all reform in Finland, which as Emperor he thought contrary to the interests of the empire.

Nevertheless at the end of the nineteenth century a sentiment began to be formed in Russia against Finnish autonomy. First of all an attack was made upon the postal service, the customs service, and the finan-

cial system. The reconstruction of these departments was worked out in 1890 by a mixed commission. When it was not possible to reach an agreement, arbitrary steps were taken, and by means of decrees the departments in question were annexed to the Russian Department of the Interior, and Russian employees were introduced into the Department of State and into the office of the Governor-General. Next, two other mixed commissions, so called, were set on foot with the object of codifying the fundamental laws of Finland, but in reality with the design of limiting Finnish autonomy. When it was seen that Finland would never consent to the diminution of its liberties, Russia determined to use force. On February 3/15, 1899, the battle, thus far carried on in secret, became an open one. A manifesto, unfortunately too well known, established, by the simple decree of Nicholas the Second, a new procedure for laws which, whether applicable throughout the whole empire or in Finland alone, might concern at the same time both countries, or be connected with the imperial legislation. Thenceforth laws of this class were reserved for the exclusive cognizance of the Czar, and the Diet had no more than a mere advisory voice concerning them. Vigorous protests were immediately made. Nevertheless the manifesto was upheld, although it was forced to remain practically a dead letter. The military reform alone, which had been previously pledged, was in 1901 treated in accordance with the new procedure. Again it was impossible to insure the application of the laws thus passed. In order to break the opposition of the country, recourse was had to measures even more severe. But the dictatorship of General Babrikow only exasperated Finnish national sentiment. His attempts at Russification ended with his murder.

These events, together with the war with Japan, and the revolutionary movement in Russia, necessitated a sort of truce. On October 22/November 4, 1905, Nicholas II decided that his manifesto of 1899 was "suspended until the questions at issue were settled by a legislative act." The Diet took up again the normal exercise of its functions and passed several important laws.

But this was only a truce; from 1907 on there were numerous indications that the battle had begun again; the approval of the monarch was refused for the majority of the laws passed by the Diet; it was decided that the nomination and the recall of the Governor-General should be made for the future in conformity with the rules of the government of St. Petersburg; the Diet was dissolved on the advice of the Russian cabinet. Then, on the 18th of May, 1908, in a lengthy discourse before

the Duma, the Prime Minister Stolypin promised a change in the relations of Finland to Russia in the near future. Some days later (May 20/June 2, 1908), without notifying the Finnish Government of the step, the Russian cabinet claimed the right to examine all Finnish questions before they were referred to the monarch, so that henceforth he might prevent the passage of any Finnish law on the pretext that it affected Russian interests. The Diet respectfully entered its protests: if in the interests of the empire the Grand Duke thought it necessary to modify on certain points the customary procedure, the sole legal method of doing so was to make a proposal to the Diet and to come to an understanding with it. The protest was answered by a decree to the effect that all questions relating to revenues should be without exception submitted to the Russian cabinet before being referred to the Emperor. And as the Diet, through its president, manifested its discontent on the occasion of the speech from the throne, its dissolution followed in consequence. New encroachments developed: by a Russian legislative act the Finnish railroads were subjected to the control of Russian inspectors; an imperial manifesto regulated the annual payment by Finland of the military contribution to the Russian treasury. The Diet, re-elected, made new protests. It was again dissolved.

However, the Czar attempted a measure which he had tried without results in 1904, and decided in April, 1909, to assemble a mixed conference, composed of six Russians and of five Finns, with the object of determining the respective spheres of the legislative activity of the Grand Duchy and of the empire. The conference could not arrive at an understanding; the Finnish delegates, refusing to admit any limitation of their constitutional rights, proposed, as regards legislation considered as common, the creation of two delegations, appointed for each case by the two parliaments and deliberating each on its own account; and they accepted the establishment of a control over Finnish laws touching the interests of the empire. But these concessions seemed insufficient to the Russian delegates, whose plans were much more radical: they claimed for the Russian Parliament the sole right to vote on general laws, the list of which, being purely arbitrary in character, might be enlarged after the wishes of that parliament; the Diet was to have in these matters only a mere advisory voice; but in return Finland was to have the right to be represented by a small number of delegates, both in the Duma and in the Council of the empire. It was the destruction of Finnish autonomy. In spite of the complete disagreement of the delegates this plan was con-

sidered as the work of the conference and in spite of the protests of the Diet it was submitted to the Duma, and on receiving a favorable majority in that body, it became the law of June 17/30, 1910. In accordance with this law two subjects were considered as henceforth forming part of the general legislation — the military question and the rights of Russians domiciled in Finland, and they formed the object of two bills submitted to the vote of the Duma and to the mere advice of the Diet. The Diet (September 26th) refused to take cognizance of them: the Russian ministry had no right to propose reforms to them, and the law of June 30th, on which the new projects were based, could have no force in Finland. The Diet was immediately dissolved (October 8th), and a new Diet was convened in the beginning of 1911.

Such is the present situation with respect to legislation. With regard to military questions, Finland had kept in 1809 an independent organization, regulated later by the law of 1878. Its army could not serve outside the country; all questions relating to it were for Finland to decide, except the following points: the Governor-General was head of the army; the Russian Minister of War served necessarily as intermediary with the monarch; all questions relating to organization, the personnel of the officers, and equipment, were reserved to the exclusive competency of the Grand Duke.

After the death of Alexander II criticisms were passed upon this autonomy. Two mixed committees, the majority of which were Russians, met at the beginning of the present reign and drew up a new project for the Finnish military code. But the delegates made reservations and the project came to nothing. In 1898 a new mixed committee, on which only one Finn served, prepared a second draft to be submitted to the Diet. The famous manifesto of 1899 hastened matters: reducing the Diet to a consultative assembly, it extended the application of the Russian military code into Finland; this involved the prolongation of the length of service, the increase of quota, the employment of Russian officers, the adoption of the Russian language, and the service of the army in Russia. The Diet declared loudly that a reform of this kind could not be made without its consent. However, in order to testify its loyalty and its good will, the Diet drew up a bill in which numerous concessions were made to the views of Russia. But at this juncture it was called upon for its advice with regard to two new bills, which under pretext of equalizing the military burdens between Finland and Russia, disposed moreover of its own military expenditures; Finland was to furnish to the

Russian treasury an annual contribution, which, amounting in the first year to 1,121,000 marks, would amount, beginning with the ninth year, to 10,000,000 marks. The Diet refused to examine them and renewed its protests. No attention was paid to them. In July, 1901, the Emperor promulgated the new military code for Finland. Then he ordered the disbanding of almost the whole Finnish army and the occupation of its quarters by Russian troops. The conflict then took on alarming proportions: on the one hand there was a resolute resistance to the application of the law; and on the other severe reprisals.

After the events of 1904-1905, Nicholas II agreed to suspend temporarily the military code, and notified the Diet of a project which, in place of personal service, required of Finland the annual payment to Russia for the years 1905-1907 of a contribution of ten million marks. In the hope of bringing about a return of legal relations the Diet was willing to adopt a conciliatory attitude. Without accepting the principle of an obligatory contribution, it consented to pay the required sum merely for the year 1905, and out of pure generosity. After the revolution, the Czar, manifesting further his kindly sentiments, repealed the law of 1901.

But the reaction which followed the dissolution of the first Duma had corresponding effects in Finland. The demand was renewed for the annual contribution for 1906-1907. The Diet ended by acceding. Then, in 1907, the contribution was claimed for the years to come, and with a progressive augmentation up to twenty millions a year, payable so long as personal service should not be established. Following the refusal of the Diet to this proposition, that body was dissolved. The payment of the contribution for the years 1908-1909 was then obtained from the Finnish *Seriat*, which, after the dismissal of several of its members, had been under the control of friends of Russia.

After the passage of the law of June 30, 1910, concerning imperial legislation, the military question became the object of a new bill. I have already said that the Diet, having refused to examine that bill as a purely consultative body, was dissolved (October 8, 1910), and that the bill was nevertheless submitted to the consideration of the Duma.

I have also said that the second of the two bills presented at the end of 1910 to the Duma had relation to the status of Russians domiciled in Finland. Under pretext of assimilation this bill sought to suppress another mark of autonomy — namely, Finnish nationality. This nationality was distinct from the Russian nationality and was the consequence

of the existence of Finland as a state. It was recognized not only by the positive law of the Grand Duchy, but also by Russian legislation and by numerous international treaties. Russians enjoy in Finland more rights than ordinary foreigners, but they are not assimilated to natives. This assimilation can only result from naturalization. The Finnish Government offered some years ago to make this change of nationality extremely easy, but its proposal met with the opposition of Stolypin. The desire of Russia is that its subjects, while remaining Russians in Russia, should become Finns in Finland, without the necessity of supporting the fiscal and military burdens; it was less a question of the rights of Russians in Finland than of the suppression of Finnish nationality, for the actual condition of Russians in Finland is quite supportable; they enjoy, with rare exceptions, all civil and public rights, they are only deprived of political rights. It is on this last point especially that assimilation is demanded. The Finns have all the more reason to resist in that experience has sufficiently taught them that an excessive liberalism in this respect would open the way to the Russification of their country. But Russia managed to do without their consent, as is shown by the project of Stolypin in 1910. However, it will not suffice to decree assimilation, it will be necessary to realize it, and here we can look for unfortunate complications; the bill provides severe sanctions against resistance on the part of the Finnish authorities; it will be easy to obtain from Russian courts condemnations by way of example, but it will be less easy to have them executed in Finland.

Such is the present situation. What will be the outcome? Will the acute conditions of the present be followed, as those in 1899 were followed in 1905, by a new truce? Will an agreement ever be reached? All the friends of Finland, who are at the same time the friends of justice, desire it most earnestly. This desire is at the same time that of the true friends of Russia, for we ask ourselves in vain on what real grounds she can persist in a contest, of which the best that can be said is that it is a very awkward one. It is claimed that Finnish autonomy has become a danger to the interests of the empire. It is asserted that Finland is ambitious to separate from Russia. Finland is reproached with living as a parasite at the expense of Russia. These accusations will not bear the test of examination. The loyalty of the Finns is above all suspicion. Their union with Russia, sealed in 1809 by mutual affection, has not ceased to represent in their eyes a bond of friendship to which they have remained unalterably faithful. They have never longed for a return of

Swedish control, although for twenty years Russia has done so much to create it in their hearts. From an economic point of view they have given to Russia more than they have received. Statistics are at hand to prove it, and that proof is given by the manuscript before me without possibility of refutation. The union has not brought to Russia any burden which she had not already or which she would not have even in the absence of Finland. It has not been the same for Finland, for she has had especially to undergo economic and financial consequences of the Russian armaments and wars. Far from having suffered from Finnish autonomy, Russia has on the contrary greatly profited. De Witte asserted in 1901 that the system set up in Finland by Alexander I had spared Russia many of the expenses connected with the administration and development of the country, and that has permitted Russia to concentrate her efforts upon other parts of the empire.

No one has ever seriously attempted to show that Finnish autonomy has had any tendency to endanger the interests of the empire. The Finnish Diet has never refused to consent to the necessary sacrifices which have been demanded of it in legal form. There is therefore no ground which can justify the Russian hostility. How can it be explained? In my opinion it can only be explained by considerations of domestic policy. Autonomy has allowed Finland to develop a constitutional form of government. Now liberty enlightens all who are near it, and acts by contagion. It is because the Russian bureaucracy, the enemy of constitutional government, fears that contagion, that it hates the Finnish constitution, and that it designs to overthrow it by destroying the autonomy from which it results. This is the only explanation which enables us to understand both the origin of the conflict and its various vicissitudes. So long as absolutism reigned in Russia the neighboring constitutional government of Finland did not seem to present any danger and the fundamental laws of the Grand Duchy were respected. But as soon as the movement towards reform began to spread abroad a new situation arose and the battle against autonomy began. On the eve, and especially on the morrow of the revolution, the desire of giving pledges of a liberal government imposed the truce of 1905, but as soon as under the constitutional forms reaction lifted its head, the battle commenced again, all the more fierce in that the spectacle of Finnish liberties became more dangerous because of the easy comparison which could be drawn between the reality of Finnish liberties and the fiction of Russian liberties.

In this light the attitude of Russia does not seem to be one that can

endure long. It is idle to seek to close the door which the revolution in Russia has opened to progress. Liberty, henceforth on its feet, will not let itself be long delayed by the obstacles put in its way. Its triumph will establish permanently the basis of autonomy in Finland. It is from this belief that the Finns should draw courage and patience to abide their time without in any way abandoning their rights.

N. POLITIS.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

[For table of abbreviations used, see *Chronicle of International Events*, p. 209.]

- Aerial navigation.* Der erste internationale Kongress für Luftrecht. *Alex. Meyer.* Archiv. f. Öffentl. Rechts, 28: 252.
- . La navigation aérienne au point de vue juridique. *H. Sperl.* R. gén. de dr. int. public, 18:47. Sept.-Oct.
- Arbitral Tribunals.* Legal limitation of arbitral tribunals. *Alpheus H. Snow.* Univ. of Penna. Law R., 60:153. Dec.
- Arbitration.* Anglo-American arbitration treaty. *T. P.* Law Quart. R., 27:379. Oct.
- . Anglo-American arbitration and the Far East. *Adachi Kinnosuke.* Amer. Monthly R. of R., 44:602. Nov.
- . The arbitration treaties. Editorial R., 5:1067. Dec.
- . The general arbitration treaties with Great Britain and France. Report of Senate Committee on Foreign Relations. Advocate of Peace, 72:222. Oct.
- Armaments.* La limitation conventionnelle des armements. *Georges Scelle.* R. pol. et parl., 70:229. Nov.
- . Ueber den Einfluss der Friedensbewegung auf die Europäischen Rüstungsverhältnisse. *Konteradmiral Glautzel.* Deutsche R., 36:129. Nov.
- Boundaries.* The breaking down of national boundaries. *Benjamin F. Trueblood.* Advocate of Peace, 70:255. Nov.
- Bright, John.* John Bright, advocate of peace. *F. Stanley van Eps.* Advocate of Peace, 70:251. Nov.
- Bulgaria.* La politique actuelle du royaume de Bulgarie. *Georges Scelle.* Q. dip. et col., 32:476. Oct. 16.
- Canada.* Canada's Relation to the Empire. *James Cappon.* Queen's Q., 9:85.
- . British diplomacy in Canada. *D. A. Mills.* United Empire, 2:683. Oct.
- . The defeat of "continentalism" in Canada: from a Canadian standpoint. *Beckles Willson.* 19th Cent., 70:942. Nov.
- . Defeat of reciprocity. *Peter McArthur.* Forum, 46:536. Nov.
- . The great victory in Canada. *Stephen Leacock.* National R., 58:381. Nov.
- . Les partis politiques au Canada. *Eugène Standaert.* R. générale, 47:641. Nov.
- . Well done, Canada! National R., 58:161. Oct.
- . What shall we do about the Navy? *Stephen Leacock.* Univ. M., 10:535. Dec.
- . R. L. Borden, New Premier of Canada. *Agnes C. Laut.* Amer. Monthly R. of R., 44:55. Nov.
- Cavour.* Cavour's last victory. *Wm. Roscoe Thayer.* Atlantic, 108:514. Oct.
- Chile-Peru.* Chile-Peru Question. Peru of To-Day, 3:17. Nov.-Dec.

- China.* Les chemins de fer français en Chine. *A. des Chaumes*. R. pol. et parl., 70:286. Nov.
- . China: a Republic. *Archibald R. Colquhoun*. Fortnighly R., 110:1032. Dec.
- . China's diplomatic ignorance. By *Foo Pan Key*. West Coast Magazine, 11:205. Nov.
- . The Chinese rebellion. *Empire R.*, 22:236. Nov.
- . Chinesische Kolonialpolitik in der Mongolëi. *Kolonial Z.*, 12:793. Dec.
- . Dr. Sun Yat Sen and the Chinese revolution. *J. Ellis Barker*. Fortnightly R., 90:778. Nov.
- . The hope of China's future. *M. T. Z. Tyau*. Contemp. R., 100:822. Dec.
- . The American on guard in China [Edward T. Williams]. *William T. Ellis*. Amer. Monthly R. of R., 44:714. Dec.
- . Les membres du cabinet responsable. [China.] R. Janue, 1:513. Aug.-Sept.
- . The most momentous event for 1,000 years. *E. J. Dillon*. Contemp. R., 100:874. Dec.
- . Reform und Reformfragen in China. *Paul Rohrbach*. Österreichische Rundschau, 29:271. Nov.
- . La révolution chinoise. *J. Saintoyant*. Q. dip. et col., 32:654. Dec. 1.
- . Die revolution in China. *Paul Rohrbach*. Die neue Rundschau, 22:1751. Dec.
- . Revolution in China. *Yoshio Markino*. English R., 9:696. Nov.
- . Revolution in China and Dr. Sun Yat-Sen. R. of R. [London], 44:457. Oct.
- . La situation politique. R. Jaune, 1:518. Aug.-Sept.
- . China and the Chinese in the newest books. Amer. Monthly R. of R., 44:723. Dec.
- . The Chinese revolt: a survey. *Adachi Kinnosuke*. Amer. Monthly R. of R., 44:717. Dec.
- . Will China break up? *Sir Henry Blake*. 19th Cent., 70:1102. Dec.
- Colombia.* Colombian situation. [Colombia-Peru.] Peru of To-Day 3:19. Oct.
- Congresses, International.* Le Congrès syndicale internationale. Budapest, 1911.
- R. R. Claes.* Le mouvement socialiste, 13:194, 270. Sept.-Nov.
- Crete.* La question cretoise. Q. dip. et col., 32:440. Oct. 1.
- Cuba.* An English view of Cuba. *Sydney Brooks*. Forum, 46:461. Oct.
- . La extraccion del Maine. *E. N. Beltran*. España y América, 9:220. Nov.
- Dual Alliance.* The league between Germany and Austria. Amer. Monthly R. of R., 44:724. Dec.
- Eastern Question.* Une confédération Balkanique. Par *Cherif. Mëcheroutiette*, Nov., p. 13.
- . Pro-oriental policy for England: Lord Curzon's support. Outlook [London], 28:725. Nov.
- . La question agraire en Bosnie-Herzégovine. *Gaston Graviere*. Q. dip. et col., 32:668. Dec. 1.

- . La question Albanaise. *Joseph Aulneau*. R. pol. et parl., 70:89. Oct.
- . Why not neutralize the dependent states of the Turkish empire? *Erving Winslow*. Advocate of Peace, 70:261. Nov.
- Egypt*. England und Aegyeten. *Hans Delbrück*. Preussische Jahrbücher, 146: 276. Nov.
- Europe*. Europe and the Muhammadan world. *Sir Harry Johnston*. 19th Cent., 70:1034. Dec.
- . L'Europe d'aujourd'hui. *Auguste Gauvain*. R. de Paris, 18:425. Nov.
- . L'Europe d'aujourd'hui. R. de Paris, 18:425. Nov.
- . Léopold Ier, les Hongrois et les Turcs. *G. Guillot*. R. d'hist. dip., 25:508. Oct.
- . La politica Europea. *P. M. Coco*. España y América, 9:368. Nov.
- France*. L'armée noire et le transsaharien. *J. Saintoyany*. Q. dip. et col., 32:404, 456. Oct. 1, 16.
- . La mission de Beauchamp à Constantinople en 1799. *A. Epitalier*. R. d'hist. dip., 25:591. Oct.
- . France and her Congo. *E. D. Morel*. Contemp. R., 100:806. Dec.
- . La main-d'œuvre étrangère en France. *P. Pic*. R. Economique internationale, 4:224. Nov.
- . La politique douanière de la France. *Angel Marraud*. Q. dip. et col., 32:525. Nov. 1.
- . La politique française dans l'affaire des Duchés et les premiers essais d'intervention européenne jusqu'à l'invasion du Slesvig. *P. Muret*. R. d'hist. moderne, 16:137. Sept.-Oct.
- Germany*. Zur Eingeborenenfrage in Deutsch-Sudwestafrika. *Ingenieur von Zwiergern*. Kol. Zeitschrift, 12:789. Dec.
- . Germany's anti-Europeanism. *E. J. Dillon*. Contemp. R., 100:561. Oct.
- . Germany's Mediterranean league. A letter from Berlin. *Robert Crozier Long*. Fortnightly R., 90:874. Nov.
- Great Britain*. The Alien Act (England). *N. B. Dearle and E. E. T. Timmern*. Economic R., 21:385. Oct.
- . Anglo-Japanese relations and imperial unity. *Dublin R.*, 149:370. Oct.
- . The British Empire. *James S. Little*. Outlook [London], 28:731. Nov.
- . The key of the empire. *J. A. K. Marriott*. 19th Cent., 70:805. Nov.
- . Our sentimentalists and our sea-power. By *Ignotus*. National R., 58: 403. Nov.
- . Some strategical questions. British and foreign. *Alsager Pollock*. 19th Cent., 70:795. Oct.
- . United Empire and British diplomacy. *Hugh E. Egerton*. United Empire, 2:783. Nov.
- . Italy's friendship. *National R.*, 58:558. Dec.
- Hague Conventions*. England und die Haager Landkreigsordnung. *Josef Kohlen*. Z. f. Völk.-u. Bundes., 5:384.

- Imperial Conference.* The Imperial Conference. W. Peterson. Univ. Magazine, 10:378. Oct.
- Immigration.* Causes of earlier European immigration to the United States. Thomas Walker Page. J. of Pol. Econ., 19:676. Oct.
- . Immigration: a Central American problem. Ernest B. Felsing. An. of Amer. acad. of pol & soc. sci., 37:165.
- India.* The Crown, the Government and the Indian Princes. S. K. Ratcliffe. Contemp. R., 100:782. Dec.
- . Indian and the Empire. World's Work, 19:1. Dec.
- International Politics.* Du rôle des puissances nouvelles du nouveau mondes dans les combinaisons internationales de l'avenir. Marquis de Barral-Montferrat. R. d'hist. dip., 25:481. Oct.
- International Society.* Le droit administratif international. R. gén. de dr. int. public, 18:492. Sept.-Oct.
- International Statistical Institute.* Das internationale statistische Institut im Haag. W. Lexis. Int. Montaschrift f. Wissen. Kunst u. Technik, 6:245. Nov.
- . La session de l'Institut international de statistique. Arthur Raffalovich. Jour. des Economistes, 70:75. Oct.
- Inter-Racial Problems.* Inter-Racial problems. Rt. Hon. Lord Avebury. Fortnightly R., 90:581. Oct.
- . Ebb and flow of the immigration tide. Herbert Francis Sherwood. Amer. Monthly R. of R., 44:697. Dec.
- Italy.* Camorra of modern Italy. Edinburgh R., 214:379. Oct.
- . Gli Italiani nel Uruguay. Eugenio Anzilotti. Rivista Int. di Scienze Soc. e Discipline Ausiliarie, 57:289. Nov.
- . La situation économique et financière de l'Italie. Edouard Payen. Q. dip. et col., 32:392. Oct. 1.
- Japan.* Japanese commercial honor. Arthur May Knapp. Atlantic Monthly, 108:778. Dec.
- . Kolonialpolitik Japans. Josef Schmidt. Deutsche R., 36:122. Oct.
- Maritime Law.* Les ententes internationales dans les transports maritimes. R. Economique internationale, 4:297. Nov.
- . Sovereignty of the sea. Edinburgh R., 214:357. Oct.
- . Über die Ausgestaltung des Seekriegsrecht seit dem russisch-japanisch Kriege. Kurt Freiherrn von Waltzahn. Deutsche Rundschau, 18:107. Oct.
- . Les brigandages maritime de l'Angleterre sous le règne de Louis XVI Comte de Germiny. R. des Quest. Hist., 46:390. Oct.
- Mexico.* La revolucion en Méjico. P. M. B. Garcia. España y America, 9:306. Nov.
- Morocco (France-Germany).* L'accord franco-allemand. Robt. Rousseau. R. Socialiste, 27:404. Nov.
- . L'accord franco-allemand. Raymond Recouly. R. pol. et parl., 70:344. 515. Nov.-Dec.
- . L'accord franco-allemand. La Quinzaine Coloniale, 15:733. Nov. 10.
- . L'accord franco-allemand. Gabriel Hanotaux. R. Hebdomadaire, 11:5. Nov.

- . L'accord franco-tedesco. *Rassegna Pol.*, 181:317. Nov.
- . Les accords franco-allemandes. *Par * * **. *L'Afrique Française*, 21:405. Nov.
- . [Les accords franco-allemands.] *F. Charmes*. *R. des deux mondes*, 6:229, 469. Nov. 1, 15.
- . L'accords franco-allemands et les negociations marocaines. *Auguste Terrier*. *L'Afrique Française*, 21:407. Nov.
- . El acuerdo franco-aleman sobre Marruecos. *Mariano Marfil*. *Nuestro Tiempo*, 11:211. Nov.
- . Après le traité. *Congo Française et Cameroon Allemand*. *Jacques Feillet*. *R. pol. et parl.*, 70:411. Dec.
- . La crise franco-allemande et l'affaire d'Agadir. *L'Afrique Française*, 21:386. Oct.
- . France and Germany. Morroco and Congo. *E. J. Dillon*. *Contemp. R.*, 100:869. Dec.
- . Die Kongokompensationen. *Kolonial Z.*, 12:718. Nov.
- . Die Marokkowissen und unser Scheinradikalismus. *Max. Schippel*. *Sozialistische Monatshefte*, Oct., p. 1387.
- . National interest in the Franco-German dispute. *E. D. Morel*. 19th Cent., 70:834.
- . Negociaciones Franco-Allemanas. *Mariano Marfil*. *Nuestro Tiempo*, 9:22. Oct.
- . Les négociations franco-allemandes. *Raymond Recouly*. *R. pol. et parl.*, 70:143. Oct.
- . La rançon du Maroc. *Robert de Caix*. *L'Afrique Française*, 21:357. Oct.
- Morocco (France-Spain)*. La zone de influencia Española en Lareche y el gobierno de Marruecos. *Francisco Lozano Muñoz*. *Neustro Tiempo*, 11:172. Nov.
- . Les negociations avec l'Espagne. *Raymond Recouly*. *R. pol. et parl.*, 70:519. Dec.
- . España y Francia. *España y Amér.*, 9:372. Nov.
- . Le débat franco-espagnol. *Commandant de Thomasson*. *Q. dip. et col.*, 32:649. Dec. 1.
- . Spanish interests in Morocco. *George F. Andrews*. *Amer. pol. sci. R.*, 5:553. Nov.
- Morocco (Germany-Great Britain)*. L'Angleterre dans une guerre Européenne. *Jacques Daugny*. *Nouvelle R.*, 24:87. Nov. 1.
- . Anglo-Deutsche Freundschaft. *Rudolf Said Ruete*. *Die Zukunft*, 20:233. Nov. 18.
- . The Anglo-French alliance. *Sidney Low*. *Fortnightly R.*, 110:999. Dec.
- . Britain and Germany: an appeal to Parliament. *J. H. Whitehouse*. 19th Cent., 70:828. Nov.
- . The conversations and after. By *Diplomatist*. *Empire R.*, 22:150. Oct.
- . Deutschland und England. *Deutsche R.*, 36:13. Oct.

- . The dilemma of German policy. By *Diplomaticus*. Fortnightly R., 90:627. Oct.
- . Diplomacy undressed. Truth, 70:1254. Nov.
- . Le duel anglo-allemand et la France. *Paul F. Fortin*. La France de Demain, 16:589, 668. Oct.-Nov.
- . England und die Anzeichen seines Niedergangs. *Grafen Vay von Vaya und zu Luskold*. Deutsche Rundschau, 38:291. Nov.
- . Englisches Salz. Die Zukunft, 20:273. Dec. 2.
- . Sir Edward Grey's stewardship. By *Diplomaticus*. Fortnightly R., 110:963. Dec.
- . Sir F. Lascelles über die deutsch-englische Verständigung. Friedens-Warte, 13:298. Oct.
- . Germany and England. *Wolfgang Michael*. Contemp. R., 100:757. Dec.
- . Kriegsminister Haldanes Rede über Deutschland und Grossbritannien. Friedens-Warte, 13:289. Oct.
- . Das Marokkoabkommen. Friedens-Warte, 13:313. Nov.
- . Ein neuer fall Arnim? Die Neue Zeit, 30:177. Nov.
- . Die neuesten Vorgänge in der Bewegung für internationale allegemeine Schiedsabkommen. *Ferdinand von Martitz*. Int. Monatschrift f. Wissen. Kunst u. Technik, 6:130. Nov.
- Morocco (Misc.). Marokko der Vergangenheit und der Zukunft. *Graf Vay de Vaya*. Deutsche R., 36:7. Oct.
- . Das Marokkoabkommen und der Rücktritt des Staatssekretärs von Lindequist. Koloniale Zetischrift, 12:736. Nov. 15.
- . Morokko. *Bernhard Harms*. Deutsche R., 36:1. Oct.
- . L'œuvre Marocaine. *René Millet*. R. pol. et parl., 70:393. Dec.
- . Questions actuelles. [Maroc.] *Gabriel Bonvalot*. La France de Demain, 16:598. Oct.
- . La répercussion de la crise marocaine en Orient. *Commandant de Thomasson*. Q. dip. et col., 32:449. Oct. 16.
- . Morocco bargain, The. Amer. Monthly R. of R., 44:667. Dec.
- . L'affaire marocaine. *J. Colin*. Revue de Belgique, 43:1011. Nov.
- . L'affaire marocaine. Q. dip. et col., 32:430, 493, 556, 694. Oct.-Dec.
- . Chronique de la quinzaine. *Francis Charles*. R. de deux mondes, 6:709. Dec.
- . La détente de la crise marocaine. *Commandant de Thomasson*. Q. dip. et col., 32:385. Oct. 1.
- . Le Maroc et le gouvernement de l'Afrique française. *Albert Duchêne*. R. de Paris, 18:264. Nov.
- . Morocco. National R., 58:197. Oct.
- . Morocco crisis and the European situation. *J. Ellis Barker*. Fortnightly R., 90:590. Oct.
- . [Morocco.] V. Rassegna Naz., 33:495. Dec.
- . Marokko. *D. Kreuter-München*. Koloniale Z., 12:721. Nov.
- . The Morocco settlement. By *Diplomatist*. Empire R., 22:228. Nov.
- Nationality. L'Allemagne et les nationalités. *William Martin*. R. pol. et parl., 70:266. Nov.

- . British citizenship. *E. B. Sargent*. United Empire, 2:754. Nov.
- . Naturalization. *John S. W. Ewart*. Canadian Law Times, 31:1. Nov.
- Netherlands*. La defense des côtes de la Hollande. *Commandant Davin*. Q. dip. et col., 32:419. Oct. 1.
- Neutrality*. Die Küstenbefestigungen an der Scheldemündung bei Vlissingen. Eine Betrachtung vom Standpunkt des Völkerrechts. *Richard Horn*. Z. f. Völk.-u. Bundes., 5:369.
- Panama Canal*. The Panama Canal and the faith of treaties. Outlook [London], 28:728. Nov.
- . Panama: the next step. *Forbes Lindsay*. Amer. Monthly R. of R., 44:595. Nov.
- . Preparations on the Pacific for Panama. *Agnes C. Laut*. Amer. Monthly R. of R., 44:705. Dec.
- Pan-American Affairs*. The Fourth International Conference of the American States. *Henry White*. An. of Amer. acad. of pol. and soc. sci., 37:7.
- . The Monroe Doctrine at the Fourth Pan-American Conference. *Alejandro Alvarez*. An. of Amer. acad. of pol. and soc. sci., 37:24.
- . The Monroe Doctrine in the balance. *Julius Chambers*. Forum, 46:525. Nov.
- . The Pan-American Conference. *Paul S. Reinsch*. An. of Amer. acad. of pol. and soc. sci., 37:16.
- Peace*. An appeal to the Friends of peace. R. of R. [London], 44:449. Nov.
- . The Berne meeting of the International Peace Bureau. Advocate of Peace, 70:248. Nov.
- . The events of the year in regard to war and peace. *A. Gobat*. Annual report of the Berne Peace Bureau. *Dr. A. Gobet, secretary*. Advocate of Peace, 70:246. Nov.
- . Folly of war and possibilities and perils of peace. *A. A. Watts*. Social-Democrat, 15:436. Oct.
- . An International Peace Number of World's Work. World's Work, Dec., 1911.
- . "Pazifisten vom Vortag und Nachtag." Über die Nactung der italienischen Pazifisten. *Alfred H. Fried*. Friedens-Warte, 13:218. Nov.
- . Peace and its perils. *Quelch*. Social-Democrat, 15:481. Nov.
- . Peace is worshipped: War is waged. *E. J. Dillon*. Contemp. R., 100:861. Dec.
- . Prospects for permanent peace. A symposium. World's Work, 23:157. Dec.
- . Recent international events and "The Great Illusion." By *Norman Angell*, pseudonym of Ralph Lane. World's Work, 23:149. Dec.
- . Le septième congrès national de la paix à Clermont-Ferrand. *G. Desdevizes du Dezert*. R. Int. de l'Enseignement, 62:323. Oct.
- . The special meeting of the American Peace Society. Dec. 8, 1911. Washington Advocate of Peace, 70:270. Dec.
- . A vision of peace. *A. S. Duncan-Jones*. Commonwealth, 16:341. Nov.
- . World peace and the general arbitration treaties. *William Howard Taft*. Reported. World's Work, 23:143. Dec.

- . Das Zusammenarbeiten der Interparlamentarier und der Pazifisten (zugleich ein Beitrag zur Vorgeschichte des Haager Schiedshofs). *Hans Wehberg*. Friedens-Warte, 13:325. Nov.
- Poland*. La première mission de Toussaint de Torbin en Pologne. *Conte de Torbin*. R. d'hist. dip., 25:532. Oct.
- Railways*. The Persian and Bagdad Railways. *Dublin R.*, 149:380. Oct.
- Russia*. La Russie sous Paul Ier. Mémoires du chevalier de Bray. R. d'hist. dip., 25:559. Oct.
- San Domingo*. Les finances de Saint-Domingue et le contrôle américain. R. gén. de dr. int. public, 18:499. Sept.-Oct.
- Sarmiento*. Recuerdos de Sarmiento, Presidente de la Argentina, sacados de sus escritos. *Alberto Palomeque*. La España Moderna, 23:41. Dec.
- South Africa*. Problem in South Africa. By Voortrekker. *National R.*, 58:307. Oct.
- Spain*. Entre l'influence française et allemande en Espagne. *Gomez Carillo*. La Revue, 93:182.
- Stolypin*. M. Stolypin. *E. J. Dillon*. Contemp. R., 100:573. Oct.
- . Stolypin. *R. Besthorn*. Gads Danske Magasin, Oct. 1911, p. 46.
- Trade*. British diplomacy and trade. *Percy F. Martin*. Quarterly R., 215:442. Oct.
- . The Orient's open door. *Cyril H. Tubc*. West Coast Magazine, 11:187. Nov.
- . Individual effort in trade expansion. *Elihu Root*. An. of Amer. acad. of pol. and soc. sci., 37:1.
- . Preferential trade in the Empire. *Benjamin Taylor*. Fortnightly R., 90:745. Nov.
- Treaties*. États Unis d'Amérique et la Grande Bretagne. Le traité Rush-Bagot, 1817. *René Waultrin*. R. gén. de dr. int. public, 18:583. Sept.-Oct.
- . Die völkerrechtliche Bedeutung staatsrechtlicher Beschränkungen der Vertreterbefugnis der Staatsoberhäupter beim Abschlusse von Staatsverträgen. *Prof. Dr. Schoen*. Z. f. Völk.u-Bundes., 5:400.
- . Le renouvellement de l'alliance Anglo-Japonaise. R. jaune, 1:536. Aug.-Sept.
- Triple Alliance*. Britain, the Triple Alliance and the peace of Europe. *Cecil Battine*. Fortnightly R., 90:793. Nov.
- . The knell of the Triple Alliance. *Y.* Fortnightly R., 90:803. Nov.
- Triple Entente*. The Triple Entente. *Laurence Lawton*. Dublin R., 149:363. Oct.
- Tripoli*. La conflit italo-turc et l'Islam. *H. Marchaud*. Q. dip. et col., 32:551. Nov. 1.
- . Les fonds ottomans et l'occupation de la Tripolitaine par l'Italie. *Henry Maurel*. R. pol. et parl., 70:443. Dec.
- . La giovane Turchia e la civiltà islamica. *P. Aurelio Palmièri*. Rivista Int. di Scienze Soc. e Discipline Ausiliarie, 57:289. Nov.
- . La guerra. Impressioni di un dilettante. *E. A. Toperti*. Rassegna Naz., 33:485. Dec.
- . La guerre italo-turque. Q. dip. et col., 32:703. Dec. 1.

- . La guerre con la Turchia. *Rassegna Pol.*, 181:314. Nov.
- . La guerre italo-turque. *Raymond Recouly*. R. pol. et parl., 70:350. Nov.
- . The Italian hold-up of Turkey. *Advocate of Peace*, 70:241. Nov.
- . Tripolitania: The Italian "White Man's Burden." *E. Alexander Powell*. *Amer. Monthly R. of R.*, 44:561. Nov.
- . Opinion in Turkey and Italy on the War. *Amer. Monthly R. of R.*, 44:605. Nov.
- . La guerra con la Turchia. *Rassegna Pol.*, 181:155, 315. Nov. 1, 15.
- . La guerre italo-turque. *L. Tsarigradski*. Q. dip. et col., 32:496, 559. Oct.-Dec.
- . La guerre italo-turque. *Raymond Recouly*. R. pol. et parl., 70:150. Oct.
- . La guerre Italo-Turque et la Tripolitaine. *L'Afrique Française*, 21:361. Oct.
- . La guerre Italo-Turque, et la France. *Antoine Redier*. *La R. Franco-Amer.*, 8:50. Nov.
- . Impressioni d'un Italiano in Turchia durante la guerra. *Un Italiano residente in Turchia*. *Rassegna Naz.*, 33:429. Dec.
- . Italian nationalism and the war with Turkey. By *Ignotus*. *Fortnightly R.*, 110:1084. Dec.
- . The Italians at Tripoli. By *Kepi*. *Blackwood's*, 110:820. Dec.
- . Italian massacres in Tripoli. 1-A protest by *Philip Thomas*. 2-Letters from *Frederick Harrison* and *E. S. Beasley*. *Positivist R.*, 228:381. Nov.
- . L'Italie et la Tripolitaine. *Raqueni*. *Nouvelle R.*, 24:145. Nov. 15.
- . Italy's civilising scheme and how it works. *Public Opinion*, 100:348.
- . Italy's move. *National R.*, 58:331. Nov.
- . Italy-Turkey. *Mècheroutiette*. Nov.
- . L'Italie en Tripolitaine, après l'annexion. *Combes de Lestrade*. R. pol. et parl., 70:436. Dec.
- . Die neue Türkei. *Rudolf Nöber*. *Süddeutsche Monatshefte*, 9:258. Nov.
- . La operazioni militari à Tripoli. *Restiamo alla Costa!* *Victor*. *Nuova Antol*, 46:331. Nov.
- . Per chi cade, per chi muore a Tripoli dicendo: Italia! *A. G. Mallarini*. *Rassegna Naz.*, 33:454. Dec.
- . Perils of invasion. Italy's "bolt from the blue." *Archibald Hurd*. *Fortnightly R.*, 110:1044. Dec.
- . Resources of Tripoli. *J. W. Gregory*. *Contemp. R.*, 100:768. Dec.
- . La situation de l'Egypt dans le conflit italo-turc. *Henry Sage*. Q. dip. et col., 32:513. Nov. 1.
- . Die Stellungnahme des internationalen Pazifismus zur Tripolia-Affaire. *Friedens-Warte*, 13:320. Nov.
- . The taking of Tripoli. *Charles W. Furlong*. *World's Work*, 23:165. Dec.
- . Tripoli. *De Gids*, 4:362. Nov.
- . Tripoli. By *Tobruk*. *National R.*, 58:369. Nov.

- . Tripolis. *R. Besthorn*. Gads Danske Magasin, Nov., p. 115.
- . Tripolis. *Scherif-Pascha*. Deutsche R., 36:192. Nov.
- . Das Tripolis-Attentat und die Friedensbewegung. *Friedens-Warte*, 13: 277.
- . Tripolis und die Friedensbewegung. *Bertha von Suttner*. Friedens-Warte, 13:316. Nov.
- . Tripolitanischer Lehrkurs. *Karl Leuthner*. Sozialistische Monatshefte, Oct., p. 1383.
- . Turkey. Un mémoire. *Mècheroutiette*, Nov., 1911, p. 32.
- . Turkey and Italy. *Empire R.*, 22:232. Nov.
- . Turkey's last stand. *James F. J. Archibald*. World To-Day, 21:403. Nov.
- . Il valore della Tripolitania. *Guida Cora*. Nuova Antologia, 156:136. Nov. 1.
- . Die Türkische Kriegsmarine. *Konteradmiral Kalau vom Hase*. Deutsche R., 36:129. Nov.
- Turkey*. L'administration provinciale dans l'empire ottomane. *L. Lamouche*. R. pol. et parl., 70:104. Oct.
- . Asiatic Turkey under the constitution. *Gertrude Lowthian Bell*. Blackwood's, 190:425. Oct.
- . La jeune turquie. A propos des "Notes" de Muscafé. *Raphael Georges-Lévy*. Q. dip. et col., 32:426. Oct. 1.
- . Turkey. Le congrès de Salonique. *Mècheroutiette*, Nov., 1911, p. 20.
- . Turkey revisited. *Wm. T. Stead*. R. of R. for Australasia, Oct., p. 133.
- United States of America*. American foreign policy. *Sidney Brooks*. English R., 9:682. Nov.
- . La América moderna. *Vicente Gay*. La España Moderna, 274:158. Oct.
- . The American attitude. *Eduard Stanwood*. Univ. Magazine, 10:554. Dec.
- . Prince Henry of Prussia and the regency of the United States, 1786. *Richard Krauel*. Amer. Hist. R., 17:44. Oct.
- . La situation économique et financière des États-Unis au point de vue des relations internationales. *G. Lecarpentier*. Q. dip. et col., 32:683. Dec. 1.
- . Stimmungsschwankungen gegenüber Japanern und Chinesen in Nordamerika. *Ernst Schultze*. Z. f. Sozialwissenschaft, 2:661. Oct.
- United States of the World*. Les États Unis du monde. D'après K'ang Yeon-Wei. *G. Soulie*. La Revue, 93:222. Nov.
- War*. War. *Wm. Graham Sumner*. Yale R., n. s., 1:1. Oct.
- . War and Empire. *Warwick Chipman*. Univ. Magazine, 10:390. Oct.
- . The web of war. *Arthur James*. World's Work, 18:522. Nov.
- . Wissenschaft und Krieg. *Sir Henry Roscoe*. Deutsche R., 36:36. Oct.

KATHRYN SELLERS.

7

THE DEVELOPMENT AND FORMATION OF INTERNATIONAL LAW *

[CONTINUED FROM THE JANUARY NUMBER.]

We have seen that in private law the Canonists and Romanists made open war on custom, and took sides against it on behalf of the written law — the formal, written word, emanating direct from the will of the supreme authority. Custom has contributed a large number of rules to the law of nations. To the examples already given we may add the formalities of treaties and the necessity of ratification; rules which appear in the thirteenth and fourteenth centuries of our era, and in accordance with which the signature of the plenipotentiaries does not make conventions binding in the absence of their confirmation by the supreme authority. Hand in hand with laws, edicts and decrees, which together form the “consular laws,” custom is still to be found in so far as regards the laws in force in the European and American States, over the territory of different important political communities, such as the Ottoman Empire, various Asiatic Powers, and certain African governmental communities. Is it necessary to recall that almost all of the laws of war are the result of customs recognized during hundreds of years, and upon which intellectual and moral progress has not ceased to exert a beneficent influence?

It was not so very long ago that writers — finding their justification in custom alone — felt that they were safe in asserting the soundness of the obligatory principle of treating prisoners with humanity, of no longer inflicting injury upon unarmed enemy subjects, who are taking no part in the hostilities, and to respect in conquered territory private property belonging to the enemy.

* The JOURNAL is indebted for this translation to Mr. Clement L. Bouvé, of the Bar of the District of Columbia.

In truth, the "good usages of war" were of binding effect long before extended efforts of a political character succeeded in causing them to be solemnly adopted and proclaimed by the peace conferences held at The Hague in 1899 and 1907. In the terms of the Hague Convention of July 29, 1899, dealing with the laws and customs of war, substituted and amplified by the Convention of October, 1907, the parties thereto agreed that

in cases not included in the regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

The vast sum of the rights and duties incident to neutrality has been, little by little, assembled, thanks to the continued observation of certain maxims, to the growth which they have acquired through the course of ages, and to the care which nations took to invoke precedents for the purpose of obtaining logical results.

Guillaume de Garden writing in 1833, spoke as follows:

Let us imagine a diet of peoples gathered together for the purpose of working upon a common code—the rights which custom had already established would remain the basis of legislation, just as they do in the case of individual citizens. * * * It would be impossible to build up a positive law based on a collection of individual national conventions, however closely related they might be. These pacts cannot constitute material for building up the science unless they show what has been recognized as their foundation, which is neither more nor less than custom. The latter, or the deductions drawn therefrom in order to apply them to analogous cases, are therefore the only source of international law.

James Lorimer says that "in every department of jurisprudence, custom or usage is the earliest form in which positive law declares itself." He adds that

even an antiquated or obsolete custom has always something to teach. It always has a meaning. No custom is ever a pure mistake, as is the case with many theories and with the doctrines which rest on them. * * * To a very considerable extent, the art of legislation consists in applying to customs a test which they partially supply, and its importance becomes apparent when we reflect that the effect of a legisla-

tive treatment is to stereotype the customs which it embodies. * * * No single treaty can have the value of a well established custom as a guide to our knowledge of the law of nations either in itself or as interpreted by the international consciousness of a particular epoch.

In 1883 Friedrich Heinrich Geffcken said that

custom constitutes the sole stable foundation of international law; that treaties and municipal legislation constitute an expression of this law, and that it existed before them and exists without them. * * * Founded upon the community of States, and on their mutual necessities, it is formed, as in private life, by the *inveterata consuetudo*, by the conviction of all the world that it cannot be otherwise; but here, the particular States take the place which individuals occupy in the formation of private law based on custom.

Nevertheless, it is to be observed that writers have questioned the influence of custom on international law. Samuel Pufendorf showed that civilized nations, having laid great stress on the fame to be acquired through distinguishing themselves by force of arms, "that is to say," says he, "to dare and to know how to cause the destruction of a great number of people, the result of which was to give rise in every generation to numbers of unnecessary and even unjust wars," the conquerors in order not to make themselves wholly odious because of their ambition, thought it convenient, while justifying themselves on the principle that they had the right to carry on a just war, to mitigate the horrors of arms and military expeditions by some evidence of humanity and magnanimity. He adds:

Hence arises the custom of sparing certain kinds of things and certain classes of persons, of putting some kind of check on hostile acts, of treating prisoners in a certain manner, and other similar measures.

Pufendorf concedes that a prince in a just war need not observe customs of this kind, provided that he does not violate the rules of natural law, and he concludes that the most that could be done would be to accuse him of a species of impoliteness if he did not follow ordinary custom, where, as amongst fencers, a man is held to be untutored in the art if he has not succeeded in wounding his adversary according to rule. A Dutch jurist who became later a professor at Gröningen, Arnold Ratgers, submitted in 1717 a thesis at the University of Leyden, in which he asserted that there was no

international law. His argument was that there was no legislation to promulgate such a law. He said that if customs existed among nations, these customs could not give rise to any right because they were vested with no element of durability, because they were subject to change and thus incapable of establishing a universal rule, and that they were moreover adverse to equity and justice. This argument could not be successfully supported; it was a paradox which its very exaggeration served to refute. With the exception of a very small number, who moreover deny the existence of international law, all writers declared that custom was of obligatory force in the law of nations; only they demanded certain conditions. Emer de Vattel in particular took the view that custom should be useful and reasonable; if it included anything that was unjust or unlawful it was of no force whatsoever, and he even went so far as to say that every nation should in special cases be under the obligation of abandoning it, because there is nothing which justifies a violation of natural laws. In 1787, Carl Gottlob Günther published the first volume of his *Europäisches Völkerrecht in Friedenszeit*. He sought to enumerate the conditions which a custom in international law ought to contain. In his opinion, the acts of the nations can leave no doubt in regard to the willingness of the nations to submit themselves to a prevailing rule; these acts have certainly come to the knowledge of other nations, or, at least, have taken place with such publicity that the latter could not plead ignorance of them; there should be room neither for protestation nor contradiction; and custom itself should have for its purpose the welfare and the security of the nations, and should be in conformity with moral precepts.

VII. THE LAW, UNILATERAL MANIFESTATIONS. CONVENTION,
LATERAL MANIFESTATIONS

A treaty, or to employ ancient terminology, a public treaty, is a convention agreed upon between two or more political communities. The question is to determine whether or not a treaty is anything more than a solemn act in attestation of a rule of international law upon a definite matter at a given epoch. Whether in addition to this it is in any way generative of the law of nations and constitutes

thus a source of the law, and whether it can establish a juridical rule binding upon political communities other than those who have signed it, is also a question.

In our international organization the treaty still takes the form assumed during the feudal period by almost every expression of the fundamental will of political communities, in other words, a contractual form. With regard to international custom, it occupies in no way the position occupied by the law with regard to custom in private law. Laband's exposition is to the point. He says:

A treaty is to be distinguished from a law and an ordinance in this, that a law just as an ordinance is an order promulgated by the State to its subjects, while a treaty between nations constitutes a promise made to any contracting party enjoying equal powers. * * * The State binds itself to deliver or to do, or not to do, such or such a thing. Constraint is not to be considered in connection with the State which assures the execution of international treaties, because the State cannot use violence against itself; there exists merely an international constraint applied by one high contracting party toward the other when the former may consider it necessary or useful.

Bluntschli has pointed out the development of law in the middle ages:

People chose frequently the force of the contract, which in the end became law. Existing States have no longer the opportunity of choosing between these two forms. They can only formulate this right in the character of a law which has its drawbacks; since law must be the product of several factors. The possibility of making real laws binding on the whole of the State only exists therefore when its whole has become a juridical person provided with a complete organization.

A French jurist, Léon Duguit, points out how the governmental will was wont to express itself in the form of a contract and how in the purely feudal conception the idea was to include in one vast contract system all the mutual relations of mankind.

Were we to limit ourselves to a statement of the relations emanating from public law alone, we might cite numerous examples of political constitutions resulting in the middle ages from conventions made between kings and princes on the one side and their subjects on the other. In Aragon, for example, the Cortes dealt with the sovereign; they alleged that they were his equals and that they could

accomplish more than he; they promised to recognize him as king provided he kept their liberty intact, and they closed the proud formula by the famous *si no, no*.

The jurists of the middle ages placed the contract above the law. "God," said Martinus of Lodi, "submitted the laws to the consideration of princes, but he did not submit them the contracts."

Duguit, whom we have just quoted says:

The feudal idea disappeared little by little before the reconstruction of the royal power on the model of the Roman estate (*propriété*) and the imperial power. In modern times the nation is endowed with the sovereignty which belonged to the king's person, and intervention on the part of the State generally takes the form of unilateral acts.

He observes, moreover, that the national contract still occupies an important position in modern society. It is not only by contractual acts that the state fulfills a part of its mission in public law, but it is also by means of contracts that the different states enter into juridical relations. Such at least is the present aspect of things.

Duguit adds:

Very probably there will take place in international relations, and in a not distant future, a decrease in the rôle played by contracts, analogous to that which we have already referred to as having taken place between individuals, and also to that which we will now show to have taken place between governments and governed; there, likewise, the unilateral will, determined by a purpose in conformity with the law, will be recognized as being in active operation and as capable of creating both an active and a passive situation. Even now signs are not wanting which predict this evolution. It will come into existence as soon as a clear understanding is reached of the strict solidarity which mutually unites at one and the same time the governments of various societies of men and the members of such societies.

As we have seen, no question of constraint self-imposed by the state, can arise. Nevertheless, treaties are obligatory in nature; it is necessary that they should be considered as such; and it is useful as well. Apart, then, from moral considerations, political considerations inspire in states the desire to respect engagements which they have undertaken, and to carry out their terms. In the protocol signed at London, on January 17, 1871, by the great European Powers, it is stated:

The plenipotentiaries * * * recognize that it is a fundamental principle of the law of nations that no Power can divest itself of the undertakings expressed in the treaty, or to change the stipulations thereof, except after obtaining the consent of the contracting parties by means of a friendly *entente*.

The scope and limits of the operation of public treaties have varied from time to time. Jurists were long content to look upon them as expressions of the national will, the frequent repetition of which furnished them with a theory to be put into practice with regard to such or such great international problem. After that they went farther still; they cited treaties which formed what they called "legislation by convention," thus giving rise to an actual formative process, a source of international law. The place of Bluntschli's doctrine is between these two systems. Taking a case where the common will is concentrated upon a matter concerning a large part of the civilized world, or indeed concerning all the civilized world, he asserts that there comes into existence a *pactum instar legis*, a law stated in conventional form; he adds that there is not really a conventional law but a law of necessity. Writers have tried from an entirely opposite point of view to weaken the force of the treaty as a manifestation of international law by alleging that it tends to show that if the parties have mutually bound themselves with regard to a given point, this is precisely because they do not consider themselves to be bound by any principle of general law.

With the development of the family of nations important conventions, declarations, and general acts have increased in number, and their force was felt even by states which were not signatories thereto. With regard to commercial treaties in general, and more specifically with regard to the commercial stipulations inserted in the treaties of Utrecht of 1713, one author observed that certain of their principles

are not transitory and subject to change as is the case with commercial treaties, but after the expiration of those treaties are to remain as a part of the general public law of nations, and to preserve their force as such.

Let us not forget that the conception of a family of nations was affirmed in the Convention of Vienna, entered into on August 28,

1736, between the Emperor, Charles VI, and the King of France, Louis XV, concerning the cession of the Duchy of Lorraine to King Stanislas of Poland, and after him to France. The general character of the celebrated declaration of 1780, regarding the rights of neutrals in time of maritime warfare, has been cited by numerous jurists. Likewise in the nineteenth century a certain number of treaties assumed a wholly general character. A new distinction was also suggested; publicists showed that side by side with treaties, the purpose of which was merely to attain the satisfaction of political interests, there were other treaties in which, as Rivier says:

the intention of contracting States is specifically to legislate in international matters, irrespective of whether they proposed to create one or more new principles or whether they decided to develop new principles already in existence.

These treaties, these declarations, these general acts, are the sources of international law.

The exact conception of these manifestations of the national will has been pointed out. Side by side with the contractual expression, that is to say, the contract of the state, or in other words the treaty, and with the unilateral expression, to wit, the order given by the state itself, jurists have pointed out the existence of what may be called manifestation by collaboration. Karl Binding, Otto Gierke, and George Jellinek, have supported the theory which stands for a distinct difference between contract and collaboration. If, they say, the contracting parties desire to obtain different ends by virtue of the contract, if the motive which gives rise to their desire is always different, if the contract which gives rise to an objective juridical situation can never give birth to a rule of objective law, in "collaboration," on the other hand, the collaborating wills desire the same thing, the motive which is the source of the will of the collaborators is identical, and the collaboration creates as between the collaborators a situation of objective law. These principles apply to private, public and international law. Jellinek, who developed the theory, devotes himself to pointing out that international law is founded not on conventions but on acts actually vested with the character of "collaboration." Its rules are not the result of conventions, made

for the purpose of advancing the interests of a particular state, and based on mutual promises, but they are established in the permanent interests of the community of states. As Duguit says in conclusion:

They are rules of objective law, and their violation constitutes not the breaking of a contract, but the violation of international law.

As regards private law and, to a great extent, public law, the authority from which the juridical rule emanates is, in the case of the modern state, the legislative power, exercised generally by one or two chambers with the cooperation to a greater or less extent of the head of the state acting in his capacity as a legislator. In so far as regards constitutional law, the creative organism is generally, but not in all countries, different from the ordinary legislative power; at least in constitutional law, when it is a question of revising the constitutional pact, a method of deliberation and voting is provided which means, in some cases, that the two chambers unite and act as one body for this purpose, and in others, calls for a greater majority of votes than is required in the case of laws. Up to the present time there is no legislative body for the society of states. Will the future furnish such an organization? How will it be formed? This problem is one which we have not to examine at this moment, but attention may be called to the conferences and congresses which have played an important rôle in the history of the last centuries. How opportune and useful these conferences were is becoming more and more evident.

The list of the conferences and congresses is very long. When the conception of the *res publica Christiana* was still in its earliest stages, a congress of the princes of Western Europe met at Arras in 1435. The purpose was to conclude a general peace between the King of France, Charles VII, on the one part, and the King of England, Henry VI, and his powerful ally, Duke Phillip of Burgundy, on the other part. A French historian felt justified in saying that it was a veritable general assembly of Christendom. The mediæval civilization was permeated with the religious element, and the Congress of Arras proved no exception to the rule. Eloquent discourses were enunciated, and religious ceremonies were pompously

held. Moreover, the œcumenic council was held at Basle, and the Pope had accredited a cardinal to each body. The legate of the council was given precedence over the legate of the sovereign Pontiff.

At the beginning of the sixteenth century, the question was agitated of assembling a conference of many of the princes of Christendom at Cambrai. The meeting did not take place, but Erasmus gives us some idea of the project itself. The accession of Leo X to the Papal throne had put new hope into the partisans of peace, who had looked with regret upon the belligerent policy of the Pope Jules II. Moreover, the Turks were threatening the whole of Christendom with destruction. It was planned to assemble in this congress, Emperor Maximilian, the King of France, the King of England, and Prince Charles of the Low Countries, for the purpose of re-establishing peace; many minor princes were also invited to attend. But the plan was never carried out. Then it was that Erasmus wrote his *Querela Pacis*, which was printed at Basle in 1516.

Amongst the congresses which made their mark in history we may mention those of Münster and Osnabrück, held in the middle of the seventeenth century, the Convention of Utrecht of 1713, and then in the nineteenth century the Congresses of Vienna, Paris, Berlin, and the Peace Conference held at The Hague in 1899; as for the twentieth century, we may mention the last Peace Conference held at The Hague in 1907.

Without doubt the question of a legislative assembly did not come up in this connection, but who, nevertheless, would be rash enough to deny that as the result of these deliberations there have arisen important rules of international law?

America also has had its conferences and its congresses. The Congress of Panama of 1826 and that of Lima of 1827 are worthy of mention; and after them the Congress of Santiago de Chile of 1856, and the Lima Congress of 1860. Finally, conventions drew together delegates from all the republics of North, Central and South America; the first of them being held at Washington in 1889.

Every sovereign state is entitled to take part in conferences and congresses. This right which Bluntschli asserts on behalf of all independent European states and which he deduces from the fact that

their existence is recognized, and that they are interested in the general destiny of Europe, belongs in the same measure to non-European states, who are members of the community of civilized states, when it is a question of the interests of that community. Every sovereign state may even take the initiative in a proposal the purpose of which is to hold such a reunion. Let us remember that at the Peace Conference of 1899 twenty-six states were represented, and that at the last Peace Conference of 1907 there were forty-four.

It is unnecessary to state that the deliberations of congresses and conferences are free to all and that each one of the states represented has equal rights in this regard. Moreover, the majority of votes is not the decisive feature. The majority is not sufficient, and the fiction is not acknowledged by which the will of the majority is supposed to represent the sentiment of the whole.

"There must," says Heffter, "be perfect accord with regard to all decisions which are to be made. Each party has the right to disagree." In 1815, Lord Castlereagh declared that he could not consider himself bound by the majority and that he reserved the right to express his dissent if the exigencies and the interests of his government called upon him to do so. On June 13, 1878, at the Congress of Berlin, Prince Bismarck, who presided over the assembly, averred that he looked upon it as an incontrovertible principle that the minority could not be bound by the majority vote. At the same time, he abstained, at the instance of his colleagues, from deciding whether or not it would be useful to the interests of the work that the resolutions of the majority regarding matters of form and not of substance could be looked upon as decisions of the congress, whenever the minority did not think it necessary to register their formal protest. At the hearing of June 24, Count Chouvalow invoked the principle by which the congress was not bound by the majority but only by unanimous vote of its members. He ended by saying that if the Powers were not in accord with the question of the choice of the personage who was to be elected Prince of Bulgaria, the election would not be valid. It is true that Pradier-Fodéré relaxes the rigidity of the rule. He takes the view that if unanimity is the rule an exception must exist when the congress has before it for its de-

cision matters of incidental interests and questions which must be considered of secondary importance in accord with principles theretofore agreed upon.

The question which has presented itself for consideration in connection with international treaties and conventions is that of determining whether under a change of conditions one of the parties may consider itself to be released from the terms of the stipulation because the reasons which led to its adoption have ceased to exist. In 1870 John Stuart Mill took up this question. He took as a starting point that

the basis of international law — without which the weak, for whose protection chiefly international law exists, would never be secure — is that the smallest and least powerful nation, in its capacity of a nation, is the equal of the strongest. Whatever rights belong to one belong to all, and can only be temporarily forfeited, even by misconduct, unless the erring nation is to be treated as a savage and thrust out of the communion of civilized nations altogether.

John Stuart Mill, considering those treaties imposing upon a nation stipulations that she shall maintain a form of government, or abjure another, that she shall abstain from fortifying certain places, or the obligation of limiting to a prescribed amount her army or her fleet, or the obligation of executing similar measures, no equivalent limitations of armaments being consented by the other party to the treaty,

says that such an obligation

ought not to exceed the length of a generation, or more properly the period at the end of which a majority of the adult population will have grown up from childhood subsequently to the offence, so that the people suffering the penalty are no longer as a body the same with those who shared in the fault. But the end in view would be in a still greater degree attained were nations to decline concluding any treaties except for a limited period. Nations can rightfully bind themselves or others beyond the period to which human foresight can be presumed to extend, thus aggravating the danger, which, to some extent, always exists, that the fulfilment of the obligations may by circumstances become either wrong or unwise.

It is useless to attempt to hide the fact that in the uncertain development of international life it frequently happens that the combinations and arrangements of preceding generations are dis-

regarded; a new order of things arises and becomes affirmed. Besides, diplomatic acts and treaties, even of the most solemn character, may thus find themselves placed in a condition of complete antagonism to an existing state of facts; in such case the terms are in direct conflict with these facts. Doubtless, let us repeat, it is not meet that one of the contracting parties should release itself from its own arrangements and tear up treaties which it has previously signed. Nevertheless, there exists a difficulty, a kind of impossibility, or rather, an absolute lack of reality; the words are in conflict with the fact. The very terminology tends towards misconception. Very often the epithets "perpetual" and "eternal" appear in diplomatic instruments. But there is a possible remedy; the United States have introduced in this connection an excellent method which is beginning to be followed. This consists in fixing the period during which the treaty shall be binding and to agree that if at a given time it has not been denounced it shall remain in force for a new period, and thus on from period to period if not denounced.

VIII. JUDICIAL SETTLEMENT OF DISPUTES.

In the order of historical facts, arbitration comes before judicial organization. Says Maxime Kovalesky:

Justice can hardly be characterized as a primitive institution; if one bears in mind the populations which constitute the field of study of ethnography it will appear to have been created in each particular case by an agreement specially entered into between the parties with regard to the subject matter; in a word it is an arbitral form of justice expressing itself in decrees which are facultative rather than obligatory.

Bearing in mind that with a vast number of peoples the dominant idea was long that of the religious origin of the law, of the necessity of magic rites to assure its observation, and that of the judicial oracle, it must be said that in olden days the decision of the settlement of differences and conflicts was not the act of magistrates vested with power from a central authority, but the act of arbiters chosen by the parties themselves. As Kovalewsky says, when men lived the life of the clan and when central authority had not yet come into being, there was no difference between a crime and a violation of a private

right; in both cases private retribution was tolerated and often the quarrel was settled by force; it was only little by little that recourse was had to arbiters. It is thought desirable to take up the question of the development of arbitration in the domestic law of states and in the law of nations. This study is suggestive in its nature. It reveals in the domain of both, the existence of an analogous "processus."

In domestic law, arbitration ended by being replaced by a regular judicial organization, by tribunals, and by judges vested with full jurisdiction. It is only on rare occasions in the course of history, and in certain countries only, that we find arbitration replacing the above and being given the preference over ordinary tribunals, or even being held binding regarding settlements between citizens or at least regarding settlements between certain classes of citizens.

In the work of organization of the family of nations two projects were followed up by those who thought deeply on these lines; one involved the establishment of a real tribunal to which the differences between states should be submitted; the other stopped short at arbitration. Arbitration alone has been resorted to up to within the last few years, but at the Second Peace Conference of 1907, the idea of the establishment of a regular tribunal found vigorous supporters. In the domestic law of all countries and in international law the same phases follow each other. In all political communities the first great step of progress accomplished by the central authorities was the restriction of the right of private war; a second great step was its complete abolition. Nevertheless, for years, side by side with arbitration and with tribunals in a state of incomplete development the dual judiciary was maintained. So even in our days in the family of nations we see war serve for the purpose of determining which of two political communities is right and which is wrong. It is admitted that brute force decides and the opinion is sustained that the divinity itself watches over the outcome of battles, causes the just to triumph and shatters the power of him who acts in violation of good faith.

At this juncture, nevertheless, the following important observation should be made. Although war is cruel, it is no longer based on practices, which, in former days, its horrors tenfold, and which, nevertheless, held their place amongst the practices recognized by and

having the support of law, such as privateering, the right of unlimited loot, and the reduction to slavery of the conquered, whether combatants or non-combatants, and such as the right of conquest which immediately transferred to the conqueror the enemy's territory, over which he held military sway. The history of the right of retribution and of private war gives rise to considerations which may generally apply to public warfare. The improvement in domestic law amongst various individual civilizations allows us to hope, or far more than that, to prophesy and assert the future progress of the law of nations. An author, whom we have already quoted, Henri d'Arbois de Jubainville, writes as follows:

The duel constituted a method of avoiding war between two families and two peoples, and to limit the effusion of blood there was a way in which any bloodshed could be prevented: It was the payment of an amount in composition by the guilty party, by his family or by his tribe. It was long believed that this method of pacific settlement, still in use in international law, was peculiar to the Germans. Nowadays it has been shown that it was in general use in the private law of the Aryan peoples, and that it was long known beyond these limits, for example, by the Hebrews, the Arabs, and the Hungarians. The law of Moses forbade the receipt of blood money; under it the murderer was punishable with death. That was an innovation. Moses was a reformer, but his legislation contains still other traces of the ancient law. The Arabic law, which has become the law of all the Mussulman nations, gives to the heir of a man killed wilfully the choice between the payment of blood money and the death of the murderer. A curious example of the Indo-European composition is observed in a passage of the law of the Twelve Tables which fixed at 300 *As* the composition amount due for the breaking of a limb when the victim is a free man, and reduces this amount fifty per cent. when the broken member is that of a slave. A law attributed to Numa suppressed the taking of money as composition for the murder of a free man and decided that this crime should be punishable with death. Composition was facultative in all probability in the case of unpremeditated killing and surely so in the less serious crimes. The offended party or his family was free to choose; they could demand either payment or vengeance. Similarly in the fourth century preceding our era the Athenians prided themselves on having been the first in Greece to substitute for the practice of war and vengeance the intervention of the courts in criminal matters. Composition for murder was a matter of custom amongst the Hindus, the Persians, the Iranian populations of the Caucasus, in Bohemia, and in Russia. * * * In Ireland it was still in use up to the end of the sixteenth century. The Brehons closed negotiations between the murderer and the parents of the dead man.

right; in both cases private retribution was tolerated and often the quarrel was settled by force; it was only little by little that recourse was had to arbiters. It is thought desirable to take up the question of the development of arbitration in the domestic law of states and in the law of nations. This study is suggestive in its nature. It reveals in the domain of both, the existence of an analogous "process."

In domestic law, arbitration ended by being replaced by a regular judicial organization, by tribunals, and by judges vested with full jurisdiction. It is only on rare occasions in the course of history, and in certain countries only, that we find arbitration replacing the above and being given the preference over ordinary tribunals, or even being held binding regarding settlements between citizens or at least regarding settlements between certain classes of citizens.

In the work of organization of the family of nations two projects were followed up by those who thought deeply on these lines; one involved the establishment of a real tribunal to which the differences between states should be submitted; the other stopped short at arbitration. Arbitration alone has been resorted to up to within the last few years, but at the Second Peace Conference of 1907, the idea of the establishment of a regular tribunal found vigorous supporters. In the domestic law of all countries and in international law the same phases follow each other. In all political communities the first great step of progress accomplished by the central authorities was the restriction of the right of private war; a second great step was its complete abolition. Nevertheless, for years, side by side with arbitration and with tribunals in a state of incomplete development the dual judiciary was maintained. So even in our days in the family of nations we see war serve for the purpose of determining which of two political communities is right and which is wrong. It is admitted that brute force decides and the opinion is sustained that the divinity itself watches over the outcome of battles, causes the just to triumph and shatters the power of him who acts in violation of good faith.

At this juncture, nevertheless, the following important observation should be made. Although war is cruel, it is no longer based on practices, which, in former days, its horrors tenfold, and which, nevertheless, held their place amongst the practices recognized by and

having the support of law, such as privateering, the right of unlimited loot, and the reduction to slavery of the conquered, whether combatants or non-combatants, and such as the right of conquest which immediately transferred to the conqueror the enemy's territory, over which he held military sway. The history of the right of retribution and of private war gives rise to considerations which may generally apply to public warfare. The improvement in domestic law amongst various individual civilizations allows us to hope, or far more than that, to prophesy and assert the future progress of the law of nations. An author, whom we have already quoted, Henri d'Arbois de Jubainville, writes as follows:

The duel constituted a method of avoiding war between two families and two peoples, and to limit the effusion of blood there was a way in which any bloodshed could be prevented: It was the payment of an amount in composition by the guilty party, by his family or by his tribe. It was long believed that this method of pacific settlement, still in use in international law, was peculiar to the Germans. Nowadays it has been shown that it was in general use in the private law of the Aryan peoples, and that it was long known beyond these limits, for example, by the Hebrews, the Arabs, and the Hungarians. The law of Moses forbade the receipt of blood money; under it the murderer was punishable with death. That was an innovation. Moses was a reformer, but his legislation contains still other traces of the ancient law. The Arabic law, which has become the law of all the Mussulman nations, gives to the heir of a man killed wilfully the choice between the payment of blood money and the death of the murderer. A curious example of the Indo-European composition is observed in a passage of the law of the Twelve Tables which fixed at 300 *As* the composition amount due for the breaking of a limb when the victim is a free man, and reduces this amount fifty per cent. when the broken member is that of a slave. A law attributed to Numa suppressed the taking of money as composition for the murder of a free man and decided that this crime should be punishable with death. Composition was facultative in all probability in the case of unpremeditated killing and surely so in the less serious crimes. The offended party or his family was free to choose; they could demand either payment or vengeance. Similarly in the fourth century preceding our era the Athenians prided themselves on having been the first in Greece to substitute for the practice of war and vengeance the intervention of the courts in criminal matters. Composition for murder was a matter of custom amongst the Hindus, the Persians, the Iranian populations of the Caucasus, in Bohemia, and in Russia. * * * In Ireland it was still in use up to the end of the sixteenth century. The Brehons closed negotiations between the murderer and the parents of the dead man.

The right of making war belongs solely to the sovereign power. In organized society it is one of the inherent attributes of the state. In the Middle Ages in the whole of Europe there was private war which was the result of the parceling out of sovereign territory. Each man was his own judge and jury, provided that he had the power to enforce his judgments. In Germany, France, Italy, Spain, and England — in all countries — it may be said a situation existed, the same at bottom, and differing only as to detail.

The advance of progress was formerly for the modification and subsequently for the abolition of private war, just as is the case to-day with regard to our efforts for rendering national warfare more humane. Unrestrained violence was followed by a new condition in which brute force was recognized but was at the same time made the subject of limitations. The right of private war, the *Fehderecht* or *Faustrecht*, took its place amongst juridical institutions. Private warfare, it must be borne in mind, may be considered from the point of view of criminal law which in the middle ages had not separated itself as yet from private law; thus it may also be considered from the point of view of political law.

The central power prohibited and limited the exercise of private war. This is to be seen in the idea of the *pair*, peace, which is encountered in connection with all peoples of Germanic origin. The *peace of the king* had in view the suppression of individual quarrels. In certain countries its development was complete. For instance, in England it was already to be found in the ancient law of the Saxons. It was rounded out in the Norman period, and in this country perhaps sooner than anywhere else, private warfare ceased to be lawful. In France, private war was subjected to precise limitation. To justify it, it was necessary that a grave, capital and public crime should have been committed. War was declared by acts, that is to say, by an open quarrel and by a *diffidatio*, or challenge duly presented to the enemy. Relatives within the circle of a more or less remote consanguinity were to take part in the war, and vassals likewise. The nobles alone had the right to have recourse to this method of deciding differences; on occasions the king granted the privilege to cities. One of the measures which was most effective

in putting a stop to the frequent recurrence of wars of this kind was the *quarantaine le roy*. The relatives of the leaders of the war were not to take part in the hostilities until forty days had passed after the *diffidatio*, and thus a delay was afforded which gave an opportunity of bringing about a settlement. In Germany the *Faustrecht* was recognized with all its consequences, and was in use up to the middle of the sixteenth century. In Spain likewise, measures were taken against the right of private warfare but it was necessary to proceed by degrees. Thus in the kingdom of Aragon the *Ricos Homes* claimed to have this right, and it was necessary for the kings to limit themselves to imposing restrictions and limitations. The kings of Aragon in particular exerted themselves to bring about the recognition of a kind of neutralization and immunity for laborers and those of clerical calling, and even Jews and Saracens who were subject to the royal authority, for widows and orphans, and all beings who were without arms and defense. They sought even to save from pillage the property of the two parties to the controversy, and to expose to the perils of warfare only the persons of the litigants themselves and those of their body servants. Damage unjustly caused was to be repaid by an indemnity of double the amount of the injury inflicted.

In what might be called the war against private war the Church was bound to play its part. At the Council of Clermont in 1095 the Decree of Peace was solemnly proclaimed. Thereafter it was frequently extended and finally sanctioned for the last time by the third Council of Lateran of 1179 as a general law of Christendom. No private quarrel could take place from Wednesday night until Monday morning of each week, at certain stated times of the year, or on certain days of solemn religious functions. Certain classes of persons, and even beasts of burden were protected on the days when hostilities were permitted. Whoever failed to observe what was called the Truce or the Peace of the Lord (*treuga or pax Dei*) was excommunicated. Any man could kill the offender with impunity. One special jurisdiction was instituted, that of the *judices pacis* or the *paci arii*, or *judices paci arii*.

Was the canonical rule which declared that the rights of peaceful inhabitants should be respected in private war to be applied to public

war, or warfare between sovereign political communities? This question gave rise to discussion amongst the lawyers. Nicholas de Tedeschis, professor of law and later Archbishop of Palermo, stated, in the middle of the fifteenth century, that the rule had fallen into disuse. His teachings had their influence, for in 1582 Balthazar de Ayala published his work on the laws of war where he cited the opinion of the Archbishop of Palermo. He made, however, one restriction, — he did not admit that priests and monks should be dispensed.

Thus during the course of centuries private war existed side by side with arbitration and ordinary tribunals. Amongst various peoples arbitration likewise was subjected to curious changes in domestic law. The great jurist, Levin Goldschmidt, says that the classic Roman law contained the well-defined conceptions regarding compromise and arbitral sentences; they were considered as creating between the parties a purely conventional law. The defendant was merely exposed to a demand in payment of the conventional penalty or for losses and damages. The idea that the arbiter gave a sort of first instance judgment was unknown to the great lawyers of Rome. Says Goldschmidt:

Roman law only in rare cases accords a direct effect to the arbitral sentence. Justinian was the first to recognize that a sentence expressly or by implication accepted by one party or the other was analogous in effect to a judgment itself.

In the middle ages recourse was very generally had to arbitration in private affairs. It was generally discussed by the jurists of the time. In the *Siete Partidas* thirteen distinct rules of law dealt with the question of arbitration and arbiters. The French jurist, Philippe de Beaumanoir, reserves a chapter for its discussion in the *Coutumes de Beauvoisis*. The history of the Italian cities throws considerable light upon the question of arbitration applied to domestic law. A number of the cities organized arbitration for the purpose of handling cases in which their citizens might be interested; in some cities it was always purely optional; in others its acceptance was absolutely mandatory, and when in certain republics the judges became unpopular, regular judicial methods were simply abrogated and replaced by recourse to arbitration.

It is worth while noting that a similar manifestation of public opinion became apparent in France at the end of the eighteenth century. The *Déclaration des droits de l'homme* announced this principle:

The right of citizens to reach a final settlement of their disputes by means of arbitration cannot be interfered with by legislative acts.

Shortly thereafter the judicial tribunals were by means of decrees relieved of their most important prerogatives and these were conferred upon arbiters. On account of this general objection to the judges and this general preference for the arbiters, the word "judge" ceased to have a legal significance; voluntary arbiters and public arbiters became recognized. Some were named by the parties; the public arbiters were named every year by electoral assemblies. Public arbiters had jurisdiction of disputes not finally determined by private arbiters or by justices of the peace; they held their hearings in public, rendered their opinions orally, determining definitively without legal procedure and without expense. There are of course numerous inconveniences to be noted. The law of 9 Ventose of the year 4 declared compulsory arbitration was unconstitutional and expressly forbade it. It had lasted barely two years. In 1798 the Council of the Five Hundred was desirous of passing a resolution tending to abolish voluntary arbitration. It was rejected in 1799 by the Council of the Ancients.

Among the numerous analogies which are common to the development of domestic law and international law there may be pointed out the transition from arbitration to an official judicial organization; in other words a change from the arbiter voluntarily selected by the parties, to the judge appointed by the sovereign authority. This appears in Roman law. In Madvig's work on the *Roman State, its constitution and administration* this is clearly indicated:

The procedure in private legal controversies, *causæ privatae* (*iudicia privata*, court procedure and decisions in matters of private law) — which like all Roman institutions extended originally to the citizens in a single city with a restricted area, regarding whose development by custom, or possibly by realignment of its limits through organizing laws we know nothing, with the exception of some few matters of details —

rested on a unique co-operation between a magisterial personage and a number of citizens chosen to perform judicial duty. The magistrate directed all legal affairs, formulated and instituted each separate lawsuit; while he referred to one or to several of the men so chosen each case in definite form for their decision; afterward he gave their decision legal force and executed it. The distinction between upper and lower courts and the testing of the same case by several appeals were unknown in the Roman Republic. Every judicial transaction, even where documents were presented as evidence, was heard verbally and in public. Of the magistrate it was said: *ius dicit*, and his function was called: *iuris dictio* (in contradistinction with the *quære* and *quæstio* of criminal procedure, with which this magistrate had nothing to do); it was the function of the judge "to find judgment" *iudicare*, and each civil lawsuit was divided into two parts: first the institution of the lawsuit before the magistrate, *in iure*, then final adjudication before the individual judge or judges, *in iudicio* (Cic. de iv. II, 19. Paul. Dig. I, 1, 11: *ubicunque prætor * * * ius dicere constituit, is locus recte ius appellatur; in ius vocare, in ius ire, etc.*). Originally the king was at the head of legal institutions, and after him the consuls (but we know nothing regarding the division of the work between them), and in their absence the *præfectus urbi*, and after the year 366 the Prætor; but, since there were several prætors, the function devolved upon the city prætor (an adjunct under the *prætor inter peregrinos*; see Chap. V, 8). Besides the jurisdiction personally directed by him in the city and its territory, and besides the judicial personnel directly under his authority, there arose — by virtue of the enlargement of the state through the subdivision of the population into municipalities (Prefectures and Colonies) and here and there into provinces — a municipal and provincial jurisdiction, from which, first in the time of the Roman emperors, when the municipal law became general, there was unfolded a uniform administration of justice for the whole empire. There was no need, nor was it to be expected, as already stated (Chap. V, 2), that the prætor, who was an administrative authority, sometimes even a general, should have had legal training; but, when composing his edicts, as well as in other special instances, he could avail himself of the assistance of the jurists.

The judges were private citizens of whom a certain number were appointed for this service, regardless of juristic knowledge and training, but with reference to their position and personal integrity; so that the prætor (*prætor urbanus* and *prætor inter peregrinos*) had to keep to the list (*album*) of these particular men. As long as the people themselves pronounced judgment in public legal matters, the men designated in the judicial list were intended only for the *iudicia privata* (perhaps excepting the *quæstiones extraordinarias* in consequence of a special law); but after the institution of permanent courts, *quæstiones perpetuæ*, they were appointed for the adjudication of criminal matters, *iudicia publica*, which were formerly adjudicated by the people, and

for each separate case there were appointed to these courts a certain number of the same men who pronounced judgment in private legal controversies, and who were designated in the law for the separate questions.

James Brown Scott has called attention to the following interesting fact, namely, that the inscription of the names of Roman judges in the *Album* presents an analogy to the list of the Court of Arbitration at The Hague, where each state furnishes the names of at most four persons from amongst which the states litigants may select the arbiters. The personnel of the list of Roman judges varied greatly owing to the great influence brought about by political changes. Henry John Roby in his *Roman Private Law in the Times of Cicero and of the Antonines* furnishes some interesting information:

Judices were according to Polybius taken in most of the important cases from the lists of senators, who, however, were disabled for this function by C. Gracchus. He put *equites* in their place. In Cicero's speech *Pro Rozcio* mention is made of a private suit in which *eques* acted as *judex*, but the date of the suit is uncertain. In 81 B. C., Sulla, as dictator, resorted the Senate to their old position. In 70 B. C., Aurelius Cotta established a separate list from which *judices* were to be taken, composed of three *decuriæ*, one of senators, one of *equites*, and one of *tribuni æarii*, who appear to have been a class of plebeians of position and property. * * * The list (*album judicum*) was revised by the *prætors* probably every year.

In the Middle Ages recourse was had to arbitration for the purpose of settling disputes arising between princes. There are numerous cases on record. We shall content ourselves with mentioning a few; special works on the subject contain numerous examples. For instance, in 1176 the Kings of Aragon and Navarre submitted to the consideration of the King of England a disputed question which had arisen between the two, and the opposing parties offered as an evidence and a pledge of their good faith and willingness to submit to the arbitral decision four of their respective strongholds. At the time of the conflict so vigorously maintained between Henry III and the barons of England under the leadership of Simon de Montfort, the two opposing parties chose Saint-Louis, the French King, to arbitrate their respective claims. The king called a meeting of the litigants at Amiens. There the delegates of Henry III and of the English

barons pleaded their cause, and on the 23rd of January, 1264, Saint-Louis rendered his decision in favor of the English sovereign. It must be admitted that the sentence rendered was not equitable, and the barons refused to accept it. Simon de Montfort called the celebrated parliament of 1265; thereupon hostilities broke out, and the heroic defender of English liberty went to his death on the battle-field of Evesham.

An important arbitration took place at the end of the thirteenth century. Boniface VIII had intervened in the dispute between Edward I of England and Philippe le Bel of France. In 1296 he had cited the two monarchs to come before his supreme tribunal; but they had refused to appear; a violent conflict had arisen with regard to the pretensions of the Pope, and the rights of the civil power had been defended. In 1298, the Pope and the two monarchs seemed to have effected a reconciliation, and the latter agreed to submit their differences to the arbitration of Boniface VIII; however, they took pains to declare that he was the voluntary choice of the parties and had been selected to act in the capacity of a private person: *tamquam privata persona et Benedictus Gaytanus*. The Pope rendered his decision in the capacity of a private person, but he published it in the "bull" confirming the sentence: "*quam pronunciationem et quæ in ea continentur, auctoritate apostolica valere volumus et plenam habere decernimus roboris firmitatem.*"

Arbitration was necessarily a matter of frequent occurrence in the mediæval period. As a matter of fact many settlements were of a private rather than of a political nature. We have but to consider the relations between dynasties, questions of succession, or of the marriage agreements between princes.

In Germany, in particular, there was confusion of private law with public law, or rather an application of rules of private law to relations really having the character of public law. The important principalities, republics and free states, entirely independent of each other, and under an authority which was purely nominal, existed in large numbers. In fact, many writers looked upon territory simply and solely as the property of the princes or of the republic. Noble families found themselves forced, in order to avoid the perils

of warfare, to make agreements in the shape of family compacts whereby wars and combats between the members thereof were to be prohibited. At times, similar provisions were imposed upon descendants or heirs of the testators and embodied in their wills. In some cases recourse to arbitration was made obligatory upon the parties. If deemed necessary these compacts and these wills were submitted to the emperor for confirmation. Paul Laband has made valuable contributions to this subject in the excellent *Recueil d'Arbitrages* of de Lapradelle and Politis.

The Middle Ages even furnish examples of permanent arbitration. The perpetual peace which was concluded in 1516 between François I and the Swiss cantons contains a permanent arbitration clause to be binding on the subjects of both high contracting parties. It is true that the author of a dissertation which was published at Helmstädt in 1731 states that at the end of the fifteenth century recourse to arbitration had become less frequent; the probable reason that he gives is that it is a proceeding full of entanglements. He cites examples of kings who resorted to deceit, *e. g.*, Louis XI, Henry VII, and Ferdinand the Catholic. At the end of the seventeenth century an Englishman, in a pamphlet directed against the French, stated that if arbitration had fallen into disfavor, the reason therefor was easily found: the arbiters were unsatisfactory to both parties and brought about a double quarrel. The scholars of the period advocated arbitration. The most famous of the peace advocates at the beginning of the sixteenth century was Erasmus who wrote, among other works inspired by his love of peace, the *Institutio principis Christiani*. Erasmus had a horror of war; he said that it did violence to human nature, that it was opposed to the doctrines of Christianity, and that its effect was baneful upon all those who might take part therein, victors as well as vanquished. He warns princes never to embark upon the track of war with a light heart and always to seek in preference thereto settlement by arbitration. In 1563 Pierino Belli published his treatise *De re militari et de bello*, which he dedicated to Philippe II, King of Spain, in whose armies he had served as auditor of war. Belli approved of arbitration, strange to say, and took the view that it is unjust to wage war against one who is willing to submit the question in dispute to the decision of arbiters.

In the seventeenth century there are to be found here and there certain provisions favorable to arbitration. At the Peace of Westphalia, signed in two instruments at Münster and at Osnabrück on October 24, 1648, certain methods for establishing a stable and permanent peace were submitted. Among these methods there is to be found the express provision that peace shall be regarded as a fundamental law, and in the nature of a pragmatic sanction of the empire. Another suggestion was the guaranty entered into by all the contracting parties to maintain inviolate the provisions looking to the maintenance of peace, even to the extent of collectively taking up arms against all those who should seek to violate it. In case of violation of any particular clause, the offended party should first attempt to cause the offender to desist by submitting the cause to amicable settlement or to the ordinary judicial proceedings.

Under the treaty of peace concluded on April 5, 1654, between Oliver Cromwell, Protector of England, and the States General of the United Provinces of the Netherlands, a sentence of arbitration was passed on the 31st of July, 1654. The question arose in connection with English ships, seized and detained in the dominion of the King of Denmark. The matter had been submitted to four arbiters who met in London and took oath before the High Court of Admiralty.

The Holy Roman Empire witnessed the development of the *Austrægal* Tribunals. The *Austrægalgericht* was really the tribunal charged with arranging differences; it was an assembly of arbiters. At times its jurisdiction was based upon a compromise specially concluded with regard to a particular case, at times upon a convention agreed upon by noble families, and at times on some provision of law.

In 1495 the Diet of Worms proclaimed a general peace to extend over the whole of the Holy Roman Empire. Private wars were abolished and the Imperial Chamber was established and given sovereign jurisdiction for the purpose of finally determining all the questions which should be brought up on appeal by the different members of the Germanic body. But the Imperial Chamber had to be composed of one judge representing the emperor and selected by him from among the high nobility, and of sixteen assessors appointed for life, one-half of whom had to be selected from scholars who had taken

a university degree. But the great nobles were still too powerful; it was decided that electors, princes and persons of noble blood were authorized by the Ordinance of 1495, promulgated with reference to the Imperial Chamber, to submit their differences in the first instance to the Austrægal Tribunal. The Imperial Chamber was sitting at that time as a court of appeal. In 1521 and 1555 the right to appeal to the Austrægsrichters was extended; the prelates, counts, barons and other nobles of the empire who were not of royal blood shared equally in this right. The Austrægal Tribunal continued to depend for its jurisdiction on conventions specially concluded, and on family compacts when the parties in dispute met for the purpose of obtaining a compromise, or when they were parties to a family compact which looked toward arbitration. Says Laband:

But in cases other than those based on these conventions, princes or persons who had the right to invoke the jurisdiction of the Austrægal courts in the first instance were under the obligation of extending an offer to their opponent in writing to act in accordance with legal procedure, whereupon the defendant selected four princes or persons of princely rank, from which the plaintiff was obliged to select the arbiter. A person thus selected exercised the powers of an Imperial Commissioner and submitted the matter to his own court of justice, reserving the right of appeal to the Imperial Chamber. If the defendant did not select the four princes or persons of princely rank, the matter came directly up to the Imperial Chamber. Thus the legal Austrægalsgericht was no longer a true arbitral court. It was a body of jurists who decided in the first instance.

In public law the United States had organized arbitration by Article 9 of the Articles of Confederation and Perpetual Union, adopted by Congress on April 9, 1778, and which remained in force up to 1789, when the Constitution of the United States was adopted. This arbitral tribunal was provided for the purpose of determining differences between the States of the Union. Commissioners designated by the States litigant or by Congress were to decide the disputes. As a result of these provisions, moreover, we find the broad powers of the Supreme Court, upon which, in the Constitution of 1789, was imposed the duty of passing upon questions arising between the various members of the Union.

While the Articles of Confederation were in force a question had

arisen between Pennsylvania and Connecticut with regard to the Wyoming valley, which each State claimed by virtue of its charter. On November 3, 1781, Pennsylvania requested of the Continental Congress that Article 9 of the Articles of Confederation, which had just come in force on the first day of March preceding, be applied. Congress established an arbitral tribunal of seven members who, on the 30th of November, 1782, decided the case in favor of Pennsylvania by unanimous vote.¹ Other questions arose between the States of the Union. New York, New Hampshire and Massachusetts on the one side, and Vermont on the other demanded the formation of an arbitral tribunal, but their request was denied. A difference between Pennsylvania and Virginia was settled without the intervention of Congress. In other cases, an agreement was reached before the arbitrators convened.² Congress claimed the right to deny the request of the States and to refuse to create the tribunal.

The United States were not slow in applying arbitration in their international relations. In the treaty of peace concluded in 1783, it was provided that the middle of the River St. Croix should, at a certain place, be the boundary line, and that the starting point should be determined by the source of the St. Croix. In the treaty of 1794, it was provided that the determination of the question as to what river was meant in the treaty of 1783 by the "River St. Croix" should be decided by three commissioners. In the treaty concluded in 1796 with the Bey of Tripoli, it was agreed

in case of any dispute arising from the violation of any of the articles of this treaty, no appeal shall be made to arms, nor shall war be declared on any pretext whatever. But if the consul residing at the place where the dispute shall happen shall not be able to settle the same, an amicable reference shall be made to the mutual friend of the parties, the Dey of Algiers, the parties hereby engaging to abide by his decision.

In the course of the nineteenth century, the United States was the theater of an extensive propaganda on behalf of peace. The names of Noah Worcester, William Ladd and Elihu Burritt may be mentioned

¹ James Brown Scott, "The Proposed Court of Arbitral Justice," in *The American Journal of International Law*, Vol. II (1908), p. 809.

² *Ibid.*

in this connection. Doubtless, peace societies were likewise formed on the continent of Europe, but it was only when the efforts of the Americans were combined with those of the Europeans that actual results were reached.

We have already pointed out that in the attempts at organization on the part of the family of nations, two methods for the settlement of disputes have received support — arbitration and the permanent court. At the First Peace Conference of 1899 and again in the Conference of 1907, arbitration carried off the honors. But the permanent tribunal has already been affirmed.

The United States set the example for international arbitration, to which the history of that country throughout the nineteenth century bears witness. The most important case which has arisen is that of the Treaty of Washington of May 8, 1871, the first article of which concerned all differences which had arisen between the Government of the United States and the Government of Her Britannic Majesty, growing out of the acts committed by the several vessels which had given rise to the claims generally known as the "Alabama Claims." All the said claims were referred to a tribunal of arbitration to be composed of five arbitrators, one named by each of the governments parties to the dispute, one by the King of Italy, one by the Emperor of Brazil, and one by the President of the Swiss Republic. It is this arbitration which culminated with the award rendered at Geneva, September 14, 1872 — an award which marks an epoch in the history of civilization.

The question of obligatory arbitration was discussed at the two peace conferences. The final act of the Second Conference signed by the delegates of forty-four Powers begins with a declaration, while reserving to each of the Powers represented full liberty of action as regards votes, enabling them to affirm the principles which they consider as unanimously admitted. The conference declares itself unanimous: first, in admitting the principle of compulsory arbitration; second, in declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of international agreements, may be submitted to compulsory arbitration without any restriction; third, in proclaiming that, although it

has not yet been found feasible to conclude a convention in this sense, the collected Powers have by their four months of collaboration succeeded in evolving a very lofty sentiment of the common welfare of humanity.

The Peace Conference of 1907 adopted a convention relative to the creation of an international prize court. In the preamble of the convention, the signatory Powers declare that if the national prize courts are to continue to exercise their functions in the manner determined by national legislation, it is desirable that in certain cases an appeal should be provided. An international prize court is constituted before which the judgments of national prize courts may be brought. It is composed of fifteen judges and fifteen deputy judges who will be appointed by the contracting Powers and must all be jurists of known proficiency in questions of international maritime law. Nine judges constitute a quorum. The judges appointed by eight Powers are always summoned to sit; the judges appointed by the other contracting Powers sit in rotation.

The Government of the United States has always been a strong advocate of international law and of judicial authority in the family of nations. In the history of modern times, it will be inscribed to the honor of Elihu Root, Secretary of State, that he instructed the delegation of his country to propose to the Second Peace Conference a permanent court which should act under a sense of judicial responsibility.

It is generally admitted in the United States that the establishment of a permanent tribunal is within the realms of possibility. Elihu Root stated before the International Conference assembled at Washington in December, 1910, under the auspices of the American Society for the Judicial Settlement of International Disputes:

Our people here in the United States are probably more ready to assent to such a view as this than the people of any other country in the world, because we have been long accustomed to the existence of a great tribunal, a part of whose duty it is to sit in judgment upon the question whether the governments of the sovereign States, and the government of our own nation, in their acts, conform to the great principles of justice and right conduct embodied in **our** Constitution. That arrangement, of embodying the eternal principles of justice in a written instrument, investing a court with the power to declare all acts of con-

gresses, and legislatures, and presidents and governors, void and of no effect when they fail to conform to those principles, is, it seems to me, the greatest contribution of America to the political science of the world.

In the history of the modern world it will be the honor of Joseph H. Choate and James Brown Scott to have proposed such a project to the Second Hague Peace Conference of 1907. A draft convention was drawn up, and the conference annexed it in the form of an appendix to the *voeux* contained in the final act in which the Conference recommends to the signatory Powers the adoption of this project and its enforcement as soon as an agreement shall be reached, particularly in regard to the selection of the judges.

It cannot be denied that the work of the peace conferences is by no means perfect. It has been criticised, but at the same time it has been successfully defended. A diplomat of Holland, the Jonkheer J. Loudon, has well summarized the merits of the work which has been already accomplished. In an address delivered at the Washington Conference of December, 1910, to which reference has already been made, he stated: we may look with satisfaction to the results reached. "Not that war is now abolished, nor that armaments are limited. The nations of the earth are still in the stage where the old Roman saying remains true: 'If you wish for peace, prepare for war.' Nevertheless, the Hague Conferences and subsequent conventions have done far more than the public at large realize to mitigate the effects of wars and even to prevent their outbreak in the future."

He calls to mind some of the conventions signed in 1899, which were revised and completed in 1907. He also cites the resolutions of 1907, regarding the duties of neutral states and subjects of such states, and of the institution of an international prize court, which again led to the Declaration of London of 1909, and to the great American proposal to establish a regular court of arbitral justice, not supplanting the existing so-called "Permanent Court of Arbitration, but offering in addition thereto all the advantages of a Supreme Court with its full judicatory equipment." Mr. Loudon, in December, 1910, spoke in a most encouraging way on the subject of an in-

ternational court of appeal in prize cases and of the project for a Permanent Court of Arbitral Justice. Touching the future conference at the Hague, he said:

When that conference meets, it will in all probability find definitively established not only the International Prize Court called forth by the Second Conference, but also that greatest achievement of all, a permanent Court of Arbitral Justice. The establishment of the new court will be due in the first place to the United States, to the Chief Magistrate, to the persevering action of two Secretaries of State, the Honorable Elihu Root and the Honorable Philander C. Knox. Above all, I think, I may say that it will be due to the brilliant initiative of Dr. James Brown Scott, the distinguished Solicitor of the Department of State.

Some months previous, Mr. Scott himself had called to mind the words of the Honorable Philander C. Knox, Secretary of State. It appeared that Secretary Knox had recently addressed a circular identical note to the Powers requesting them to collaborate with the United States in the establishment of a truly permanent tribunal, composed of professional judges, which tribunal shall be at The Hague, ready to receive a case when it is presented and to decide it without the delay or friction so often involved in the creation of a temporary tribunal. The responses to the circular had been so favorable that Secretary Knox believed that a truly permanent court of judges, acting under a sense of juridical responsibility, would be established in the immediate future and that the Third Peace Conference would find it in successful operation.

An ingenious proposal was submitted to various members of the Second Hague Conference by James Brown Scott, regarding the jurisdiction of the permanent judicial court which was to be established.³ According to his plan the court shall be competent to receive, consider and determine any claims or petitions from a sovereign state touching any difference of an international character with another sovereign

³ The original American project was the joint work of the technical delegates of the American Delegation, Messrs. Charles Henry Butler and James Brown Scott. For the text of this document, see Scott's *American Addresses at the Second Hague Peace Conference*, pp. 206-209. — J. B. S.

state, provided that such difference is not political in character and does not involve the honor, independence and vital interests of any state. It shall not be competent concerning any petition or application from any person, natural or artificial, except a sovereign state. It shall not take any action on any petition or application which it is competent to receive, unless it shall be of the opinion that a justiciable case, and one which it is competent to entertain and decide and worthy of its consideration, has been brought before it, in which case it may in not less than thirty nor more than ninety days after the presentation of the petition invite the other sovereign state to appear and submit the matter to judicial determination by the court. It follows that it would be possible for a state to call another state to the bar and thus bring about a judicial presentation of the question. It is true that one danger exists which must be avoided: that of wounding the pride of a sovereign state. However, the following provision obviates the difficulty: should the court invite a state to appear and submit the matter to judicial determination, the state so invited may (a) refuse to submit the matter; (b) refrain from submitting the matter by failing for a certain number of days to make any response to the invitation, in which event it shall be deemed to have refused; (c) submit the matter in whole, or (d) offer to submit the matter in part or in different form from that stated in the petition, in which event the petitioning state shall be free either to accept the qualified submission or to withdraw its petition or application; (e) appear for the sole purpose of denying the right of the petitioning state to any redress or relief; in case the court does not sustain this, it shall renew the invitation to appear. In case the states in controversy cannot agree upon the form and scope of the submission of the difference referred to in the petition, the court may appoint, upon the request of either party, a committee of three from the Administrative Council, and this committee shall frame the questions to be submitted and the scope of the inquiry, and thereafter if either party shall withdraw, it shall be deemed to have refused to submit the matter involved to judicial determination. If such a procedure could be decided upon, all the difficulties which beset the path of arbi-

tration would be overcome. The court of justice would be ready to hear the lawyers and representatives of the states, parties to the cause, and it could act in its capacity as a judicial tribunal and arbitration would be superfluous. There would be no longer necessity for general arbitration conventions, nor special *compromis* concluded with regard to a particular dispute; all states would be in the presence of a true international tribunal and in the position of the citizen of a civilized country who having an injury done to his rights, may cite him whom he accuses to have been the author of the wrong to meet him before established tribunals

IX

HAS WAR THE SANCTION OF THE LAW OF NATIONS.

As has been seen, to take the view that law has developed along certain stereotyped lines and according to a set plan, would be to involve one's self in a strange error. Institutions of a certain type, if we may be permitted to dignify these experimental steps with the name of institutions, appear at the outset, such as decisions the sanction of which are founded on the practice of magic; later, arbitral sentences; thereupon customs only partially recognized as such; then for long years still, a sanction based on religion; and finally at a very late period, judges partaking of the nature of arbiters — such are the successive steps taken in the domain of private law. The theory of public law affords a similar example of interrupted, halting advancement, of wavering and uncertain efforts. In these days the same conditions obtain among a large proportion of the world's population which for centuries regulated the rules of the forbears of the men who to-day can point with pride to a complete juridical organization. Up to a few years ago the imperfection in the rules of the law of nations and in their application was apparent to every eye; it seemed only too true that the application of force alone was competent to decide national differences, and that there was no opportunity to resort to the principles of justice and equity. Even at the present time distinguished men, men of national affairs or men devoted to study and research, entertain false conceptions of the nature

of international law. They do not take into consideration that in the conferences, at the most important of which there were gathered together the delegates of forty-four sovereign states, a large number of international juridical rules were drawn up, formulated and promulgated; and they never cease to point out as a weakness of international law the absence of a legislative organization and of a completely equipped judicial power. We have had occasion to consider in detail the history of the law in its development among a number of civilizations, and feel that we have refuted any argument that can be based upon this absence of legislative organization or of judicial tribunals in any one of the three great subdivisions of the law. If there is not as yet a sovereign authority having paramount control of the members of the family of nations whose decrees are final, the creative force of international conventions expressing the collective will of the parties thereto, cannot be denied; similarly, arbitral tribunals are frequently called upon to settle disputes.

The International Court of Maritime Prize is in a more advanced stage of development. In a word, the foundation on which a true court of international justice is to be erected, already exists.

The question of the law's sanction has often been the subject of discussion. To state that in the absence of sanction there can be no law would offer but a poor solution of the problem. The study of private constitutional law supports this view. It is not true that *Recht ist Zwang*. Law is more powerful than mere force and none the less law because it is not observed. The fact that power is subject to abuse is no argument against the existence of law, nor can it result in making just that which is unjust. He who has faith will apply to the law Pascal's words on the subject of truth: "Truth lasts forever and finally triumphs over its enemies, because it is eternal and is as powerful as God himself."

Moreover we must not forget that writers have shown that as a matter of fact international law has its sanctions. They cite pacific means, methods of constraint other than those offered by war, or even war itself. They cite public opinion, a force which is always increasing, although as yet not crystallized, the influence of which is felt over the whole world at the present time.

Can it be said that war has in reality the sanction of law, or, in other words, is it reasonable to admit that by its means international conflicts are decided, and that the nations look upon the outcome of war as being in the nature of a judgment?

War has its enthusiastic advocates. Joseph de Maistre wrote as follows: "War is of itself divine, because it is one of the laws of the world." He attributed its divine character to the mysterious glory in which it is enshrouded. He calls attention to its frequent recurrence, and seems to find great comfort in the fact that "the whole earth, always drenched with blood, is naught but an immense altar whereon all living things are to be sacrificed without end and without respite in unnumbered thousands, up to the last day — up to the death of death." This glorification of a horrible act whereby men take up arms against each other is best appreciated in connection with the general idea expressed by the same writer, that of expiation and atonement: centuries may elapse before the execution of the meritorious act and its recompense, or between the commission of the crime and its punishment. What matters it to Joseph de Maistre that the innocent be stricken like the guilty and that the avenging angel shall wreak his wrath upon the nations? The difficulty is that we can not admit the merits of this bloody doctrine. The most fervent of the faithful would have to revolt against this conception of a divinity, which not only tolerates the existence of evil, but extends it his protection and approval.

Louis Claude de Saint Martin exercised an influence on the development of the ideas of Joseph de Maistre, but, with regard to this especial point the teachings of that mystic philosopher are imbued with kindness, and ideas more humanly akin to nature herself: "I have a horror of war," wrote Saint Martin. "The Jewish revolt led by the Maccabees was a holy uprising," he says. "They offered up prayers for the Maccabees at Jerusalem. Beyond finding them possessed of statues of idols, they were obliged to wash away the stain of blood, the stain which prevented David from building the House of the Lord."

No; war is not a divine institution with which mankind is endowed for good or evil. Hatred and slaughter do not constitute the founda-

tion of political societies. This observation, which finds its justification in history itself, is developed in an unpublished manuscript of Montesquieu: "Beasts do not make war amongst themselves. Feeling that they are equal, they have no desire to attack each other." In his printed works there are to be found remarks like the following: "The end and aim of human existence is self-preservation." "It is natural for a man to love; he loves and seeks to love."

Writers have sought to depict war as being a political instrumentality. More than five centuries ago Egidio Colonna, the author of the *De Regimine Principum*, expressed this opinion. He belonged to the illustrious Colonna family of Rome, but his teachings and position as tutor to the young prince known as Phillippe le Bel, and his appointment to a bishopric in France, gave him a prominent position amongst French writers. Egidio Colonna looked upon war as a political act.

Karl von Clausewitz, the famous author of the book entitled *Vom Kriege*, also considered war as a species of political activity. For the rest, while taking the view that war is a method to be employed for the purpose of bringing about a given political situation, the Prussian general was far from classing it as an intervention on the part of Providence in the affairs of mankind. He compares it to single combat, to a duel in which each of the opponents seeks, to the best of his ability, to harass his adversary and to break down his defenses. He defines war as an act of force by which an opponent seeks to compel his adversary to submit to his will. The means employed are the destruction of the hostile forces and the capture of hostile territory; but the chief aim is to make it impossible for the enemy to continue the struggle and to force him to accede to the conditions dictated by the victor.

This realistic idea is very different from the conception of Sir Francis Bacon, who, no doubt, was a friend of peace, but in whose opinion

wars are no massacres and confusions, but the highest trials of right, when princes and states which acknowledge no superior upon earth, shall put themselves on the justice of God for the deciding of their controversies by such success as it shall please Him to give on either side.

According to Clausewitz's idea, war is devoid of all mystic elements, and does not constitute a method of invoking the divine will. It is no more than a means of which men make use for the purpose of carrying out their political projects of aggrandizement and hegemony. Thus the following question arises: Are these ambitious projects of aggrandizement and hegemony in truth in conformity with the real interests of mankind? Is it necessary or is it opportune, in order to succeed in making good some legitimate claim, for a nation to involve itself in the waste of forces and material, which is the necessary result of modern warfare carried on with instruments of destruction such as during the long centuries of the past the world has never known? Is it opportune for even the strongest and most powerful nation to expose itself to the risks involved in the military operations of to-day, in the course of which millions of men oppose each other in armies provided with the most terrible engines of warfare, and under conditions where the most unforeseen circumstances can bring about an absolute change in the relative situations of the opposing forces?

We should not take the view that in the absence of war national development and progress is not to be expected. How do political communities reared upon foundations of violence, bloodshed and the destruction of peoples compare with states which owe their creation and their national development as well to pacific means? Let us consider for a moment those nations which during years of peace have gathered in intellectual and material wealth, and have fostered the development of the arts and sciences, of industry and commerce. Have empires which have sprung from the mating of blood and iron proved more durable than they? History has valuable proof to offer on this point. Those civilizations which have been founded on principles of high-minded and kindly dealing have stood for peace. The world itself, the stage on which the descendants of the present generation will work out their destinies, teaches us a valuable lesson. It was long thought that in the history of the world sudden changes, destruction and the shock of formidable masses was the natural course of events. According to A. Gaudry we must not believe that order is the necessary result of disorder. The world in a geological

sense was not the scene of sudden changes wrought by devastation, but a calm and majestic field of action, and it is wrong to look upon progress as the result of the conflicts and suffering of bygone days — as the price of struggles where the stronger have overcome the weaker and crushed them out of existence.

In answer to the suggestion that war is an actual condition with which the world must reckon, the weakness of the objection is easily exposed. Now, at the beginning of the twentieth century, the idea is still generally accepted that war is the true arbiter of disputes between nations, just as formerly on the continent of Europe, and even now amongst primitive peoples, where the process of organization is still in its first stages, the view is general that as a matter of domestic law private war and trial by combat determine by their outcome whether or not a cause is just, and establish the axiom that might is right. The notion of private war was the outcome of false conceptions. The notion of public war or of war, to employ the term which is always used, rests likewise on a false foundation. It must be driven out by the aid of reason. It must be prevented from being put into practice by appealing to the idea of international tribunals, by advocating diplomatic intercourse and arbitration, and, finally, by insisting upon the establishment of a permanent court of justice. Let us be active, patient and persistent. Now is no time for weakness or anxiety. The day is coming, and it is coming soon, when the nations of the earth will gladly acknowledge what they owe to those who are now striving their utmost to wage war against war, and to abolish the inhuman practice whereby man concentrates the fires of his genius and the material forces which lie ready to his hand to perpetrate this deed of shame: the massacre and annihilation of his fellow man.

ERNEST NYS.

THE EVOLUTION OF A PERMANENT INTERNATIONAL JUDICIARY *

In his instructions to the American delegation to the Second Hague Conference, Secretary of State Root pointed out as the weakness of the present system of arbitration the prevalence of diplomatic ideals instead of purely judicial ideals in practice and procedure, and stated it as his opinion that the creation of a truly permanent international court composed of professional judges, who should act under a sense of judicial as distinguished from diplomatic responsibility, would increase the confidence of nations in arbitration and render the recourse to this method of settling international disputes much more frequent. Secretary Root's statement is so important in itself, the reasoning is so clear and unanswerable, the proposal to establish a permanent international court of justice so clean-cut and precise, and the details which he specifies so simple and apparently self-evident, that I shall quote and comment briefly upon this passage in the instructions. "There can be no doubt," he says, "that the principal objection to arbitration rests not upon the unwillingness of nations to submit their controversies to impartial arbitration, but upon an apprehension that the arbitrations to which they submit may not be impartial. It has been a very general practice for arbitrators to act, not as judges deciding questions of fact and law upon the record before them, under a sense of judicial responsibility, but as negotiators effecting settlements of the questions brought before them in accordance with the traditions and usages and subject to all the considerations and influences which affect diplomatic agents. The two

* The substance of the present article has appeared in *The Hague Peace Conferences of 1899 and 1907*, Vol. 1, pp. 188-193, 460-464; and in the following addresses: 1. *Judicial Proceedings as a Substitute for War or International Self-redress*, published by the Maryland Peace Society, February, 1910. 2. *Progress toward an International Court of Arbitral Justice*, delivered at the Lake Mohonk Conference on International Arbitration, May 19, 1910, and printed in the Report of the Proceedings for that year.

methods are radically different, proceed upon different standards of honorable obligation, and frequently lead to widely differing results. It very frequently happens that a nation which would be very willing to submit its differences to an impartial judicial determination is unwilling to subject them to this kind of diplomatic process."¹

It is but natural that the Supreme Court should be the prototype of the permanent tribunal which Mr. Root has in mind, because it was created by the original thirteen States, and in the one hundred and twenty years of its existence it has decided many controversies of an international character between the States of the Union. "If there could be," he says, "a tribunal which would pass upon questions between nations with the same impartial and impersonal judgment that the Supreme Court of the United States gives to questions arising between citizens of the different States, or between foreign citizens and the citizens of the United States, there can be no doubt that nations would be much more ready to submit their controversies to its decision than they are now to take the chances of arbitration."² In a later portion of the present article I shall endeavor to show how the Supreme Court itself developed from an imperfect form of arbitration by temporary commissions.

In the next place, Mr. Root instructed the American delegation to propose such a permanent tribunal to the Conference. "It should be your effort," he stated, "to bring about in the Second Conference a development of The Hague Tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility."³ The delegation complied with its instructions and secured not only acceptance of the principle of permanency, but the adoption of a draft convention regulating the organization, the jurisdiction, and procedure of such a tribunal to be known as the Court of Arbitral Justice.

¹ Foreign Relations of the U. S. (1907), part II, p. 1135.

² Foreign Relations of the U. S. (1907), part II, p. 1135.

³ *Ibid.*

Finally, Mr. Root stated in a single sentence the foundations upon which the proposed international court should rest. "These judges should be," he said, "so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented. The court should be made of such dignity, consideration and rank that the best and ablest jurists will accept appointment to it, and that the whole world will have absolute confidence in its judgments."⁴ The first article of the proposed court embodies Mr. Root's instructions because it is to be "composed of judges representing the various juridical systems of the world."

It is not my purpose here to discuss the Court of Arbitral Justice, but to show by a somewhat detailed examination not only the feasibility of Mr. Root's proposal, but how arbitration has unconsciously or consciously developed into judicial procedure, and how arbitration by contract of the parties to a quarrel or dispute became a substitute for self-help. Indeed, arbitration stands midway between self-redress, whose excesses it has stayed, and judicial decision, whose disinterestedness and impartial determination it foreshadowed. Arbitration is, therefore, not an end in itself, it is but a means, and marks a stage of transition from private lawlessness to public peace. As proof of these assertions, I shall examine in some detail the growth of Roman law, from the period of self-redress, through the period of arbitration by contract, whether the arbiters were solely judges of the disputants' choice, or, as in the later period of the Republic, persons selected from a panel of judges or arbiters, until the period of the imposition of the judge by the state and the execution of the judgment as an act of state in the later Empire.

I shall next show how arbitration between states by arbiters or judges of their own choice stayed self-redress, and how, in 1899, the First Hague Conference unconsciously followed the course of Roman judicial development by creating a permanent panel of judges from which the judges for the temporary tribunal should be chosen. And I shall, by a concrete example taken from the history of the United States, show how the system of the temporary tribunal with judges

⁴ *Ibid.*

of the litigants' choice was merged in the Supreme Court of the United States, which was, by express agreement of the States represented at the Constitutional Convention of 1787, invested with jurisdiction to entertain and decide suits between the States, with the result that the Supreme Court assumed the proportions and exercises the functions of a permanent international court, originally for thirteen, but now for forty-eight States, composed of judges acting under a sense of judicial responsibility in the determination of disputes between the States of the American Union.

The analogy between the development of judicial procedure in that system of law which lies at the basis of the law of most modern nations and which has largely entered into and given form to international law, and the growth of the system of arbitration between and among the states forming the family of nations, will, I believe, indicate the course of judicial development none the less real because unconscious; and the experience of the United States under the Articles of Confederation with temporary commissions of arbitration will show how public arbitration, just as private arbitration, glides insensibly or unconsciously into a permanent judicial institution; so that the establishment of a permanent international court of justice is in such strict accord with the course of judicial development as to appear inevitable. In predicting that an international court is inevitable, I do not mean to assert that it will duplicate or resemble in all respects national judicial institutions. The existing conditions between nations recognizing no superior require that the court be a creature of contract and negotiation of the parties to its creation; it can not be superimposed by the statute of a non-existing international legislature; the execution of its judgments must depend upon the good faith of the parties litigant, not upon the efforts of an international sheriff or marshal clothed with the power of the international community. Good faith on the part of the litigating nations, controlled by an enlightened public opinion, has been sufficient to secure compliance with the awards of international commissions and tribunals, and there seems no reason to provide for an emergency which has not yet presented itself.

For the purpose of tracing the development from self-redress to

arbitration by private contract, and from arbitration to judicial procedure as illustrated by the growth of the Roman judiciary, I shall rely upon certain well-known writers. The facts are patent and only require to be analyzed and interpreted. They suggest of themselves the analogy with international development, which will, however, be pointed out as occasion arises. For the various steps in the process by which arbitration stays self-redress, or permits its employment only when the litigant does not comply with the award, and by which voluntary arbitration of the parties becomes a compulsory process in which the state cooperates with the litigant in framing the issue and appointing the arbiter or judge chosen or agreed upon by them, I refer to and rely upon the following authorities: 1. Matthiass, *Entwicklung des Römischen Schiedsgerichts*; 2. Sir Henry Maine, *Ancient Law*; 3. von Jhering, *Geist des Römischen Rechts*; 4. Moyle, *Imperatoris Justiniani Institutiones*.

In the brief introduction prefixed to his monograph on the development of Roman arbitration, Professor Matthiass shows the general existence of arbitration in the primitive periods of the Indo-Germanic peoples and the transition from self-redress of the disputants to the intervention of the state. Sir Henry Maine states in a few brief but luminous sentences that the whole system of procedure of the Roman law originated in the repression of self-help by the *Legis actio per sacramentum*, which presupposes a quarrel between private disputants and a stay of the resort to force, by the substitution of a wager as to the right of the parties to the object in dispute. This fruitful conception is borne out by the actual procedure obtaining in the latter days of the Republic as appears by the account of the *actio per sacramentum* given by Gaius in his *Institutes*. Professor von Jhering shows by a careful analysis of the Roman forms of action that arbitration by private contract was their necessary prerequisite, and that they can only properly be understood by setting free the spirit from the letter in the procedure of the historic period of Roman law. And, finally, Dr. Moyle, relying upon von Jhering and Maine, sums up in a few measured paragraphs the process of development from self-redress through arbitration to a permanent and official judiciary.

It is difficult to resist the temptation to quote at length from Professor Matthiass, but a few isolated sentences will have to suffice for the present purpose, with a reference to the translation of the introduction to his monograph which follows this article:

The arbitration of controversies can be proved to have existed in the earliest historical times; it is an institution which was known to the primitive Indo-Germanic peoples, and its antiquity becomes comprehensible to us when we consider it as a symptom of a definite period of civilization during which the transition from self-help to state-help was being brought about.⁵

The learned author considers arbitration to have arisen in the epoch when the community recognized the binding nature of the rules of law, appreciated the value of human life and property, deprecated the resort to arms, and prevented the wrangling disputants from appealing to force, at least in the first instance. The parties in conflict turned to a third party who possessed their confidence, to decide who was in the right or wrong. Professor Matthiass points out that a failure to accept the decision of the third party aroused the disapproval of the litigants' henchmen, who consequently were the more disposed to help the victor in the execution of his right. He next shows that the moral result of the transaction was enhanced if the award was delivered by a person clothed with political or religious authority, such as the chief, king, or priest of the community. Physical strength gave way to a wager as to the right of the contending parties, and, as a pledge of earnestness, each deposited with a third party a wager, forfeit of which to the victor was a compensation or satisfaction for the denial of his contention. The transaction is indeed very simple, but in the wager and its forfeit Professor Matthiass sees the origin and the oldest form of arbitration. The award decided not merely that the victor was entitled to the wager, but that he had the moral right to resort to self-redress.

The wager as a sanction of the right or wrong involved in a controversy is, according to Professor Matthiass, not merely a custom or primitive institution of Indo-Germanic law; it likewise existed among the Northern peoples as well as among the Greeks and the Romans.

⁵ See appendix to this article, p. 341.

As Professor Matthiass points out, the parties in conflict were not content with the abstract determination of opposing views; the victor wished the concrete result, namely, the possession of the object in accordance with the award, either by the voluntary action of the loser or through self-help, for in the eye of the community the victor was himself entitled to enforce the right recognized by the award. The subsequent development and the establishment of arbitration as a public institution are thus described by Professor Matthiass:

It has already been briefly mentioned elsewhere that the contending parties addressed themselves to a judge to award the wager, who was the representative of an authority either religious or secular, then existing in the community or in the process of development. The advantages of this are obvious: The arbiter possessed legal knowledge and impartiality; his decision carried the necessary weight; the arbiter had at his disposal the moral or physical means either to bring about the voluntary fulfillment of the decision or to compel it from the recalcitrant. The appeal to such authorities led of necessity to the situation where the arbiter became judge. And this process was brought about all the more surely when the arbitrator himself was interested in increasing his authority. This course of development necessarily led little by little to a modification of the primitive wager. Self-help was now in principle done away with through the development of law and of state-help. The ancient contest of opinion had in consequence lost its practical significance; and although the form of the wager was preserved, the new wager was merely a method of procedure. In like manner the function of the wager (stake) changed. Whenever the authority that was appealed to guaranteed the execution of its decision, the stake could be considered as performing the function of an equivalent of the sum awarded the arbitrator. It would, of course, not be against the spirit of the wager if the amount thereof were adjudicated to a third party. Even, as is the case at present, the victor might find his satisfaction in that a third party profited by the decision.⁶

The idea of staying self-help by the resort to arbitration is admirably brought out by Sir Henry Maine, who breathes the breath of life into what appears to be the oldest of Roman actions. He declares the proceedings before the early tribunal to be an imitation of the act of the disputants who stopped quarreling and submitted their case to the passer-by, and he speaks of the magistrate as "carefully simulating the demeanor of a private arbitrator casually called

⁶ See appendix to this article, p. 343.

in." The same eminent author declares the *legis actio per sacramentum* to be the oldest judicial proceeding of Rome, and that out of it "all the later Roman law of actions may be proved to have grown."⁷

Turning now to Gaius, whose authority Sir Henry Maine vouches for his theory, we find that the Roman jurist gives an account of this form of action which, universal in the early days of the Republic, gave way to the more plastic process of the formulary system which had grown up in custom and was recognized by statute in the last century or century and a half of the Republic.

Gaius, writing in the second century after Christ, informs us that the *sacramentum* was the general form when no other mode was appointed by law, and applied to real as well as personal actions. The thing in dispute was brought into court, if this could conveniently be done, and the litigants claimed the property in the presence of the prætor; if the property in question could not conveniently be carried to or laid before the prætor, "a portion was brought into court, and the formalities were enacted over it as if it were the whole. If it was a flock of sheep or herd of goats, a single sheep or goat, or a single tuft of hair was brought; if it was a ship or column, a fragment was broken off and brought; if it was land, a clod; if it was a house, a tile."⁸ The parties and the subject-matter of the dispute were thus before the magistrate. In the instance from Gaius, the dispute is as to the possession of the slave, whom the claimant grasped, saying:

"This man I claim, as proprietor, by due acquisition, by the law of the Quirites. So as I said, see! I have covered him with my spear," whereupon he laid his wand upon the man. The adversary then said the same words and performed the same acts. After both had claimed dominion, the prætor said: "Both claimants quit your hold," and both quitted hold. Then the first claimant said, addressing the second: "Answer me, will you state on what title you found your claim?" and he replied: "I perfected my title when I covered him with my spear." Then the first claimant said: "Since you claim him in defiance of law, I challenge you to stake five hundred asses upon the issue of a trial," to which the other answered, "I accept the challenge." * * * The prætor then awarded to one of the claimants possession of the thing pending the suit, and made him bind himself with sureties to his adversary to restore both

⁷ *Ancient Law* (Pollock's edition), p. 362.

⁸ Gaius, *Institutiones juris civilis* (Poste's edition), ch. IV, § 17.

the subject of dispute and the mesne profits or value of the interim possession in the event of losing the cause. Both parties gave pledges to the prætor for the penal sum which the loser was to forfeit. The wand or straw which they wielded represented a lance, the symbol of absolute dominion, for the best title to property was held to be conquest.⁹

On this passage Sir Henry Maine makes the following comment:

Such was the necessary preface of every ancient Roman suit. It is impossible, I think, to refuse assent to the suggestion of those who see in it a dramatization of the origin of Justice. Two armed men are wrangling about some disputed property. The prætor, *vir Pietate gravis*, happens to be going by and interposes to stop the contest. The disputants state their case to him, and agree that he shall arbitrate between them, it being arranged that the loser, besides resigning the subject of the quarrel, shall pay a sum of money to the umpire as a remuneration for his trouble and loss of time.¹⁰

It would be presumptuous to add a touch to the picture, which is complete and persuasive of primitive custom and procedure. The armed struggle, for the disputants were originally armed, has given way to peaceful settlement. The wand placed upon the object is merely a step in the process, the original meaning of which is lost upon the parties. The assertion of property and the readiness of the plaintiff to make good his assertion by force, the counter assertion of the defendant and his equal readiness to maintain his right by force, which were at first grim realities, have, in the process of time and civilization, become fictions, but they are fictions which point to self-redress and can only be properly understood by the law of self-redress.

In a remarkable passage in his *Geist des Römischen Rechts*, Professor von Jhering deals with the primitive determination of a disputed right, after showing that self-redress had full sway when the right in question was formally admitted or was not the subject of dispute. The learned author points out that while some peoples appealed to the Deity or higher power, the Romans adopted the method of settling legal controversies by mutual agreement. He regards the recognition of this fact as essential to a correct understanding of the

⁹ Gaius, *Institutiones juris civilis* (Poste's edition), ch. IV, § 16.

¹⁰ *Ancient Law* (Pollock's edition), pp. 363-364.

legal institutions and procedure of republican and imperial Rome. Thus,

the party whose right was disputed by his opponent proposed to the latter arbitration by an impartial third party, or else left the decision of the matter in dispute to his opponent's conscientiousness, that is, he requested him to declare under oath the non-existence of his right. If the opponent accepted either the one or the other proposition, the further course followed naturally; the decision rendered by the arbiter, or under oath, was based upon mutual agreement; it was, therefore, binding upon both parties; it established an undoubted right, and consequently the legal power of self-help. But, what became the situation when the opponent declined to accept the proposition of the claimant? By his refusal he passed judgment upon himself; for, why refuse if he was convinced of his right? He showed that he had no confidence in the righteousness of his cause; and no injustice was shown him who thereby cut off every chance for a decision, if in his refusal there was found an indirect confession of his guilt. Self-help (if not quite the *legis actio per manus iniectionem*) had free play against him.¹¹

Von Jhering next states in a single paragraph the transition from private to public arbitration. Thus,

The institution of arbiters, as well as the extra-judicial oath, set aside the practice of self-help by affording to the presumptive claimant the possibility either of bringing the dispute to a decision, or at least of forcing the opponent morally to the wall, and to compel him by his refusal to the indirect confession of his unjust claim. In even a later period of Roman history both systems were unusually popular and customary, and both in solemn form reappear in later Roman judicial proceedings. In the latter system I see nothing else than the residuum, reduced to regular and permanent form, of the custom which had long before existed, where the parties themselves decided legal controversies by agreement. The extra-judicial oath becomes the judicial oath, the arbiter becomes the public judge, and neither of the two loses (surrenders) the former character.¹²

After noting the distinction between the ancient judge and the modern judge, who was appointed by the state, and who not merely declares but carries out the law, von Jhering then proceeds to say:

The Roman judge was not invested with this function; he exercised the same functions that belong to every arbiter. The striking similarity

¹¹ See appendix to this article, p. 348.

¹² See appendix to this article, p. 349.

between the two led a Roman jurist to remark: *Compromissum* (selection of an arbiter) *ad similitudinem judiciorum redigitur*. In later times it may have seemed natural to look upon the judicial office as the original of which the institution of arbiters was only the copy.¹³

Von Jhering next maintains that as the magistrate was originally the chosen arbiter of the parties, so it became in time his duty to co-operate with the parties, not as arbiter, but in the selection of the arbiter, who, though appointed by the magistrate, was chosen by the parties and designated at their request. As this is the crux of the question and makes the entire procedure in civil actions flow from the private contract of the litigants, as a substitute for self-redress, it is translated and quoted in full:

It may have occurred frequently that the parties sought arbitral decision from a magistrate who had distinguished himself by his knowledge of the laws or by his integrity. Fulfillment of their wishes, in so far as the magistrate was concerned, was originally looked upon as a matter of honor; in time it became his official duty. An overwhelming number of such requests led the magistrate to suggest in his place some other qualified person, as well as to refuse, once and for all, to hear many controversies. If the later law restricted the number of cases to be heard, then the earlier law must have heard fewer yet. The sole difference between the ordinary arbiter and the arbiter designated by the magistrate, or the magistrate himself when he decided that the question was within his own jurisdiction is, that the former had first to be requested to take charge of the case, while the latter's co-operation was certain wherever custom or law had established his official function; in all other respects they were equals. The arbiter owes his power to the choice of the parties; he is merely their agent; his function solely consists in pronouncing sentence; the carrying out of this sentence is left to the parties themselves. In like manner, the judge of the old Roman law derives his authority only by appointment of the parties. This is clearly proven by the fact that a legal controversy cannot be instituted when the opponent refuses his consent thereto. A decision of the magistrate or of the judge designated by him, to which the opponent has not in advance subjected himself, is not binding upon him. The dispute, which the opponent has with the claimant is simply a private affair; how could the magistrate, without invitation of both parties, be permitted to interfere? Therefore, if the accused refuses, a legal controversy can not at all be instituted against him; the complainant must seek redress as best he can; and he does this, as we have seen above, by resorting to the *manus injectio*. If the accused declines the proposition of the complainant to

¹³ See appendix to this article, p. 349.

submit to judicial decision, the latter, in such case, need not heed the wishes of the accused should he wish to take the case up again; self-help has free course.

If a legal controversy cannot be instituted without the consent of the accused, we may then infer what the situation will be when he consents to a legal controversy. The entire proceedings rest upon the contract of the parties. Both agree upon the arbiter whom the magistrate is to designate, and they promise to each other to abide by the decision. The authority to decide the case proceeds, therefore, not from the fact that the judge is a public officer, but from the fact that he has been chosen by the parties. We may designate their contract as a conditional promise; they promise that the victor is to have possession of what the judge shall decree in his favor.¹⁴

Von Jhering next points out the consequences of these proceedings; the old obligation is extinguished by the new conditional agreement. The cause of action, even although it arose from a crime, has assumed the form and has the consequences of a contract between the parties. The *litis contestatio* is, in his opinion, a contract concluded in the presence of the praetor and the witnesses, and although the contractual nature of this form of proceeding is questioned, it is admitted nevertheless to have the consequences of a contract; and the force of the judicial sentence, based upon the contract of the parties to submit and to abide by the decision of the judge is, according to von Jhering, "to be traced back to the contract between the parties as to the true cause."

Without further dwelling upon the many and interesting details, which are, however, but steps in his argument and conclusion, I translate and quote the final paragraph with which von Jhering ends his treatment of the subject:

The judge of the old law, therefore, imposes no obligation upon the accused; he issues no order against him in the name of the state; but with his knowledge of the law he comes to the assistance of the parties. The judgment has appropriately expressed the relation of the judicial function to that of the complainant. The judge is merely to indicate the law (*dicere*), hence he is called *judex*, and he does this by rendering his opinion (*sententia*). On the other hand, the complainant is the acting party (*actor*); he does actually "act," for he takes in "hand" (*manum injicere, conserere; vindicare*), depending on whether the legal

¹⁴ See appendix to this article, pp. 349-350.

controversy is instituted against persons or things (*agere in personam, in rem*). The present-day judge "rights" (=judges), that is he is the acting party, while the complainant does not act, but presents his grievance to the judge, so that the latter may help him. The Roman complainant does not depend on assistance; in all cases where his right is evident he has no need of the judge, but proceeds forthwith to self-help. The Roman judicial office is, therefore, only instituted to afford opportunity to the parties in doubtful cases to have the law indicated. But the judicial decision exercises no effect which the parties might not just as well obtain by some other course; and the reason why it possesses no deciding force lies not in the public character of the judicial office, but in the will of the parties. The judge, therefore, is nothing else than an arbiter (arbiter); and there were many cases in which he was referred to by that name.¹⁵

Let us now endeavor to summarize the results, and, in reliance upon the authorities quoted, to reach conclusions as to the development of legal procedure during the historical period of the Roman Republic and the Empire. In the passage quoted from Sir Henry Maine, it is apparent that the resort to arbitration, the origin of which was stated by Professor Matthiass, has become customary, but that the state, as representative of the community, cooperates in bringing it about. The friends and followers of the litigants may indeed be present at the formulation of the issue and the appointment of the judge, but they are witnesses of the oral proceedings which take place, not their followers or partisans and in the sense that they espouse the cause of the parties in dispute, and aid the victor in the process of self-redress. The praetor does not himself decide the controversy, although the magistrate may have originally done so. The primitive idea of the voluntary nature of the procedure is, however, present; the praetor assists or cooperates, he does not impose his authority or enforce a settlement. He either arbitrates or decides at the request of the parties. The state does not summon the defendant; the plaintiff produces him and his presence is essential both in the framing of the issue, and in the appointment of the arbitral judge and the reference of the dispute to him. The judge is a private person, not a magistrate clothed with the power of the state. His decision is not a judgment in the modern sense of the term, but an opinion or award

¹⁵ See appendix to this article, pp. 351-352.

(*sententia pronunciato*). It is not enforced by the state because it is the opinion or finding of a private person, based upon a contractual agreement of the parties who have agreed to its delivery and promised to comply with its terms. That it is private in its nature, and that it derives no official character or standing from the cooperation of the magistrate, is shown by the fact that the tribune who might interpose his veto to the act of the magistrate is never known to have controlled the judge or to have imposed a veto to his action as such.

The victor, as in the early days, is free to execute the sentence, as appears from the provision of the Twelve Tables. It is, however, a private execution and the person of the defeated defendant is seized by the victorious plaintiff and subjected to his will, upon non-compliance with the finding of the arbitral judge. He is not confined in a public prison, but in the house of the plaintiff. Upon failure to execute the award, the plaintiff proceeds to personal execution, selling him into slavery at the public market, putting him to death, or forcing him to satisfy the claim by personal services.

The primitive nature of the proceedings is apparent. The plaintiff forces the defendant before the magistrate, where they agree upon the issue, that is, they enter into a contract of submission to an arbiter or judge, and von Jhering maintains that the famous *litis contestatio* is a contract. If this is not strictly so, it nevertheless has contractual consequences. The arbiter or judge selected by the parties, although appointed by the praetor, replaces the casual bystander, but he is still a person having the confidence of the litigants, and the finding of the judge sets loose the right of redress of the plaintiff, which is personal self-execution.

The system of legal actions, Gaius informs us, falls into disuse by reason of its formal and unsatisfactory nature. The *lex Aebutia* passed in the last century, or the last century and a half of the Republic, sanctions the newer custom of reducing the issue to writing — the proceedings in the earlier system being oral — and in so doing the parties were free to frame the issue in such a way as to get an award on the substance of the contention unembarrassed by its form. This is the system of the later Republic and of the Empire, and, however modified in detail, the substance is still unchanged. The magis-

trate assists the parties who appear before him. The arbiter or judge is appointed by agreement. The judge is a private person and his finding is not the act of the state. Alongside of this process the praetor reserves certain cases or categories of cases for his own decision, giving rise to what was called the extraordinary procedure, in which he acted at one and the same time as magistrate and judge. This procedure, which was speedy and more satisfactory, gradually displaced the older or ordinary procedure in which the parties appeared before the magistrate and, with his cooperation, selected the individual judge. The Emperor Diocletian and his immediate successors abolished the ordinary and prescribed the extraordinary procedure in all cases.

I now pass to the question of the selection of the arbitral judge. We may readily admit that in primitive times unrestricted freedom of selection was the rule; the casual bystander, a third party, having the confidence of the contestants. As pointed out by Professor Matthiass, the chieftain, king or priest could be a preferred party; or the magistrate, as mentioned by von Jhering. Usage would harden into custom, and custom has in primitive times the force of law, or rather is the law. We do not need to trouble ourselves with details of the early regal period of Rome or determine whether by usurpation or custom the king decided and enforced the judgments, or whether Servius Tullius restored the freedom of choice of the arbiter or judge, or divided the proceedings into the proceedings *in jure*, that is, before the magistrate for the formation of the issue and the selection of the arbiter or judge, and the proceedings *in judicio*, that is, before the person so chosen. From the time of the Twelve Tables down to the reign of Diocletian, this system of procedure, whether based upon the legal action or the formula, obtained.

The important fact to note is that the freedom of choice of the arbiter or judge, essential to arbitration, existed during the entire period, although the parties were aided or restricted in the choice of the judge to particular classes. Thus, by customary law the judge was chosen from the Senate, which thus constituted a permanent panel; the knights were admitted by legislation dating from the days of the Gracchi, and in the year 70 B. C. the classes from which the

individual judge could be chosen were specified by the *lex Aurelia*, which formed the basis of subsequent regulations. The persons possessing the legal qualifications were mentioned in a list drawn up by the praetor and published in the *Album Judicum*, from which the parties under cooperation of the praetor selected the individual judge for the trial and determination of the special case. The composition of the list or panel is stated by Madvig and Roby, in the extracts appended to this article.¹⁶ The abolition of the distinction between magistrate or judge, or, rather, the direction of Diocletian to the magistrate to act and decide as judge, with the assistance of official subordinates, merged a temporary panel of arbiters into a permanent judiciary. The litigants were summoned into court, their cases determined by the magistrates acting as such and whose decisions were acts of the state and enforced as such by officials clothed with the imperium of the state. The edict of Diocletian, introduced in appearance at least no radical change, for just as the system of actions and the formulary process existed side by side, the magistrate had for generations reserved to himself and decided as magistrate certain cases without reference to private judges. This extraordinary procedure had no doubt existed side by side with the ordinary system of decision by private judges. The extraordinary procedure without the private judge was prescribed by Diocletian and his successors, just as in the last hundred years or more of the Republic, the formulary decision was recognized by the *lex Aebutia* and rendered exclusive, with some exceptions, by two *leges Juliae*, passed in the Augustan period.

Disregarding details, the process of development is simple: self-redress yielded to private arbitration; arbitration by contract was recognized by the state, and in its details the magistrate assisted, but did not impose his authority. The unrestricted freedom in the choice of arbiter or judge gave way to selection from a permanent list or panel, which method in turn yielded to the permanent judiciary composed of magistrates and their official assistants. The forum of the parties has become the court of the state and its development from

¹⁶ Pages 354-355.

arbitration by contract was lost upon jurists of the Empire (Pomponius for example), just as it is lost upon us, and they were guilty of the curious anachronism of developing private arbitration from judicial procedure, instead of developing, as was the fact, judicial procedure from arbitration by contract of the parties.

As stating the course of development here outlined, and the necessary development of arbitration into a judicial procedure, I quote a singularly illuminating passage from Dr. Moyle's edition of the *Institutes of Justinian*, which passage is based upon and is a complete acceptance of the views of Maine and of von Jhering, which have been previously quoted or explained:

The earliest judges derived their judicial authority, such as it was, not from the state, but from the voluntary submission of the parties; and Sir H. Maine has shown, by an examination of the earliest Roman civil process, that the magistrate, even when commissioned by the state for the administration of justice, preserved the memory of the actual historical source of his functions by "carefully simulating the demeanor of a private arbitrator casually called in." The later Roman jurists, though struck by the similarity in procedure between an ordinary action and a reference to arbitration, were guilty of the curious anachronism of deriving the latter from the former: "compromissum" (one of them says) "ad similitudinem iudiciorum redigitur;" but the fact is that action grew out of arbitration, and the judge was originally only an unofficial referee: a fact of which traces are observable throughout the legal history of Rome. Thus, no action could validly be commenced, still less carried through to judgment, until the court had got both parties before it: for arbitration can take place only by consent, not by a unilateral act of either of them without the other. Still more forcibly are we reminded of the mode in which the early judge acquired his jurisdiction by the vitality of the rule that no judge could be forced upon a party of whose knowledge and integrity he was not satisfied: "neminem," says Cicero, "voluerunt maiores nostri non modo de existimatione cuiusquam, sed ne pecuniaria quidem de re minima esse iudicem, nisi qui inter adversarios convenisset." Hence too the limited authority, as we should deem it, of the Roman *iudex*: he has no "imperium;" he can not compel the parties to any act or forbearance; he is merely a referee whom they have chosen, and in whose appointment the magistrate has cooperated; all he has to do is to decide the questions submitted to him, so far as the parties may enable him; he has to leave to them the realization (by execution) of the right he ascertains. The very point he has actually to settle is at first kept studiously in the background and hidden behind a wager; the decision is not an order or injunction, but an expression of opinion, *sententia*, *pronuntiatio*.

In England we know from actual records with what rapidity trial by jury in civil causes, though in most cases optional only, superseded the more barbarous methods of compurgation, ordeal, and trial by battle, and that this was largely due to a sense of the greater justice and reasonableness of the new system. We can hardly doubt that upon much the same grounds the practice of arbitration daily gained greater favor among the Romans. When political authority has at length obtained a firm footing, the magistrate is gradually preferred by litigants to a citizen arbitrator, perhaps from a conviction of his greater wisdom and impartiality; if he is a king, perhaps too because his divine descent is believed to confer upon him a sense of right, and a kind of knowledge, above his merely human fellows. Finally, the judicial function is recognized as appertaining to the state; though the primitive remedies may to some extent survive in all their rudeness, and though the state administration of justice may still more widely bear traces of the social condition which preceded political organization, still the natural mode of deciding a dispute is to go to the magistrate, and rules of civil procedure have begun to assume consistency. Courts have become established; their mode of action is prescribed by law; any attempt to evade their authority by recurring to other methods of obtaining satisfaction, save in certain well-defined cases, is considered a defiance of law, and a breach of the peace.¹⁷

The analogy between the development of arbitration in Roman civil law, which culminated in a permanent judiciary, and the origin and progress of arbitration by contract between nations, is so apparent that they only need to be mentioned without elaborate statement or argument. We know how arbitration between nations has originated as a substitute for self-redress, and we do not need to go beyond recorded history and reconstruct a primitive condition of society by the collation of texts, as in the case of private arbitration. We are unfortunately familiar with the fact that self-redress is the recognized method by which nations maintain their rights or redress their wrongs, just as individuals in primitive communities resorted to force to redress their real or supposed wrongs. But when a consciousness was slowly developed in the community that indiscriminate self-redress perpetuated a wrong which it was meant to redress, and affected in no small measure all members of the community, arbitration by agreement of the parties makes its appearance, becomes a usage, crystallizes into custom, so that a refusal to arbitrate is looked

¹⁷ See appendix to this article, p. 353.

upon not only as a confession of a weak cause but as a breach of the peace. The community recognizes arbitration, cooperates in bringing it about, if it does not effect the settlement, until the casual and voluntary adjustment by private agreement becomes a public institution. In like manner a respect for the principles of law within national lines, and the benefits derived by all members of the community from their application, suggest the possibility of employing the system of arbitration between nations in the settlement of their disputes, provided a similar respect for justice obtains in the foreign country. Arbitration between nations requires, however, not merely respect for law, but confidence that the award rendered by judges of their choice will be given force and effect. We find, therefore, that the authentic instances of arbitration are only to be found in the ancient world among the Greek states. For, however these states may have differed among themselves, they formed, as regards the outer world, a composite community, recognizing a common origin, with common traditions, common customs, a common speech, and, in a lesser and varying degree, common ideals. It is not, therefore, surprising that they should resort to arbitration, and there are not merely actual instances of it, but formal treaties by which the states pledged themselves to arbitrate not only existing, but future disputes. Resort to it, however, was voluntary and by special agreement, and recorded instances show that the arbiters were at times cities, states, magistrates, or selected foreigners possessing the confidence of the parties. There appear, however, to be no instances of arbitration between Greek states and countries of a different or alien civilization, because the foreigner, that is to say, the non-Grecian, was looked upon as a mere barbarian. It was only the Greek community which possessed that consciousness of a common respect for justice which is the prerequisite of arbitration.

In the middle ages we find the states of the West united by the common bond of Christianity, and there are many instances of arbitration between them, although they were not united by the ties of a common origin and civilization. But where the bond of religion was absent, as between the Christian and the infidel, there could be no arbitration. And so in more modern times we find that the states

forming the family of nations constitute a closed circle within which and among whose members arbitration is resorted to. The procedure is, however, voluntary, and self-redress is stayed by the contractual submission of differences. The judges are judges of the parties' choice — king, priest, magistrate, learned bodies, or carefully selected persons enjoying the confidence of the parties in dispute.

In 1899, the First Hague Conference solemnly recognized international arbitration as the most efficacious and equitable method of settling disputes which diplomacy had failed to adjust; and it unconsciously, but nevertheless in fact, followed Roman precedent by creating a panel or list of judges from which the temporary tribunal could be selected for the individual case. Thus, it is provided by Article 23 of the Convention for the Pacific Settlement of International Disputes, which the late Mr. Holls aptly termed the Magna Charta of international law, provides that

within the three months following its ratification of the present Act, each Signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrators. The persons thus selected shall be inscribed, as Members of the Court, in a list which shall be notified by the Bureau to all the Signatory Powers. Any alteration in the list of Arbitrators is brought by the Bureau to the knowledge of the Signatory Powers. * * * The Members of the Court are appointed for a term of six years. Their appointments can be renewed.

And Article 24 provides that "when the Signatory Powers desire to have recourse to the Permanent Court for the settlement of a difference that has arisen between them, the Arbitrators called upon to form the competent Tribunal to decide this difference must be chosen from the general list of Members of the Court." The nations represented at the First Hague Conference thus recognized that the resort to arbitration would be materially aided by the existence of a list of judges ready and willing, upon request, to assume the duties of arbitrators, and the *Album Judicum* of the nations was formed. At the same time an elaborate and satisfactory code of procedure was drawn up for the guidance of the prospective litigants, and, unconsciously, it would seem, the great step was taken toward the formation of a

permanent judiciary; for, it is believed that, just as arbitration by private contract within one jurisdiction, with judges selected from a permanent panel, developed into a national judiciary, international arbitration by contract of the parties, by judges drawn from a permanent panel or list, will develop into an international judiciary. Hence, Secretary Root's instruction to the American delegation to the Second Hague Conference to propose a permanent court composed of permanent judges by profession; hence the proposal of the American delegation to establish such a tribunal; hence, the draft convention of thirty-five articles, approved by the Conference, defining the jurisdiction, composition, and procedure of such a tribunal. A method of selecting the judges acceptable to all the states represented at the Conference was not devised, but the draft project was accepted and the method of selecting judges relegated to subsequent diplomatic negotiation between the nations.

The temporary tribunal, with judges of the parties' choice, formed for the trial of a particular case, is unsatisfactory. In the first place, it requires negotiation to constitute it, and diplomacy is proverbially slow. In the next place, only the parties before the tribunal are bound by its award, because they alone have constituted it, and it is therefore a private court, not an international one, even although the principle of law involved may be of universal importance or applicability. The judgment of an international court to whose jurisdiction all nations are subject would bind the nations, just as the judgment of the Supreme Court binds the States of the American Union and their respective citizens. Again, a temporary tribunal passes out of being with the trial of the case. It is not bound by the decision of its predecessor, because in the strict sense of the word it has no predecessor, nor is its decision binding upon its successor, because a new tribunal is a thoroughly independent body. The lack of continuity of decisions arises from the defects of the system, and we can not hope to develop international law by a body of judicial decisions, as the Common Law of England has been developed, unless The Hague Court becomes truly permanent and recognizes the persuasive force of previous decisions. Finally, the method is expensive, although this item is of minor importance in the development of a

system of law. That the temporary international tribunal selected even from a permanent panel of judges is unsatisfactory from this brief statement of some of its defects, and that it results naturally and logically, although unconsciously, in a permanent judiciary, is evidenced by the development which has taken place in the United States.

From the Declaration of Independence of 1776 until the Articles of Confederation of July 9, 1778, and their final adoption in 1781, the Colonies were independent states and their government was a purely provisional one, by which they acted in unison for the maintenance of their cause. They regarded themselves as independent states and treated with each other upon the basis of independence and equality. They had many disputes concerning their boundaries, due to the overlapping of colonial charters, which they endeavored to adjust by diplomatic methods by the appointment of commissioners. The methods of diplomacy were apparently unsatisfactory, and, in Article 9 of the Articles of Confederation, provision was made for the adjustment of disputes between the States by a temporary tribunal whose judges were to be selected from a panel or list of thirty-nine commissioners or judges. Thus Congress was to be the last resort in controversies between the States over boundaries, questions of jurisdiction, and other matters. When the authorities or authorized agents of a State petitioned Congress to settle a dispute or difference, notice of the fact was given to the other State in controversy and a day set for the appearance of the two parties by their agents, who were thereupon directed to appoint members of the tribunal by common consent. Failing an understanding, Congress designated three citizens of each of the States of the Union, and from the list thus formed each party, beginning with the defendant, struck alternately a name until only thirteen remained. From these thirteen, seven or nine were drawn by lot, and the persons thus designated composed the court, which decided the controversy by a majority of votes. A quorum of at least five judges was required. In case of nonappearance of one of the parties without a valid reason, or of refusal to take part in the formation of the tribunal, the Secretary of the Congress performed this duty in its stead. The award was

final in all cases, and each State pledged itself to carry out the award in good faith. Each commissioner was required to take an oath before one of the judges of the Supreme or of the Superior Court of the State in which the tribunal sat — "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope of reward."¹⁸

It will be noted that the members of the tribunal could be appointed by common consent, just as Article 24 of The Hague Convention for the Pacific Settlement of International Disputes provides that the composition of the tribunal may be by a direct agreement of the parties. Failing this agreement, the appointment of the judges is secured by express regulation (Article 24 of the Convention; Article 9 of the Articles of Confederation). It appears that under the ninth article of the Articles of Confederation, one controversy was finally determined (*Pennsylvania v. Connecticut*); that commissioners were appointed by mutual agreement in two controversies, which were, however, settled out of court (*Massachusetts v. New York*; *South Carolina v. Georgia*), and that there were petitions for the appointment of a court in some two or three other cases.

It is of more than passing interest to note that the dispute between Pennsylvania and Connecticut was of very considerable importance and involved the possession of Wyoming Valley, now Luzerne County of Pennsylvania, which territory was claimed by each State as included within its charter. The court was appointed by direct agreement of the parties, and it consisted, as finally constituted, of five persons who met at Trenton, New Jersey, and rendered a unanimous judgment in favor of Pennsylvania, on December 30, 1782.

In the case of *Massachusetts v. New York*, the parties likewise agreed (June 9, 1785) to the composition of the temporary tribunal, consisting of nine judges, without resorting to the method of striking provided for by the ninth article, but this dispute was settled out of court by express agreement of the parties (December 16, 1786).

The case of *South Carolina v. Georgia* is the only instance of the composition of the temporary tribunal by alternately striking, upon

¹⁸ See appendix to this article, p. 355.

motion of Georgia, names from the list of thirty-nine commissioners or judges, until thirteen remained. From the list thus reduced, nine names were drawn to form the court (September 13, 1785): Messrs. Hanson, Madison, Goldsborough, Duane, Dickerson, Dickinson, McKean, Benson, and Pyncheon.¹⁹

The efficiency of such a tribunal is evidenced by the distinguished careers of the commissioners, but the court never met, as the States agreed to settle their difference by compact.

The procedure can not be said to have been satisfactory in view of the few instances in which it was employed, and in view of the further fact that it was specifically rejected by the members of the Constitutional Convention of 1787. That it was regarded as an improvement upon diplomatic adjustment, whatever its imperfections may have been, is evidenced by the fact that its main principles figured as Article 9 in the proposed constitution reported by the Committee of Detail, presented by Mr. Rutledge to the Federal Convention on August 6, 1787. When this provision was considered it was the subject of debate and discussion. According to Madison's report, Mr. Rutledge said "This provision (for deciding controversies between the States) was necessary under the Confederation, but will be rendered unnecessary by the National Judiciary now to be established, and moved to strike it out." Mr. Williamson, on the contrary, "was for postponing instead of striking out, in order to consider whether this might not be a good provision, in cases where the Judiciary were interested or too closely connected with the parties." These doubts were shared by Mr. Ghorum, because "the Judges might be connected with the states being parties." He was, therefore, "inclined to think the mode proposed in the clause would be more satisfactory than to refer such cases to the Judiciary." The question to postpone was put and lost. Mr. Wilson thereupon "urged the striking out, the Judiciary being a better provision," and on a vote being taken the provision was struck (ayes 8, noes 2, absent 1).²⁰

¹⁹ For an account of Articles of Confederation and the proceedings had under Article 9, see J. C. Bancroft Davis' learned note, in 131 U. S. Rep., pp. XII-XIV, LXIII. Professor Jameson's article entitled "The Procedure of the Supreme Court," in the *Essays on the Constitutional History of the United States*; Carson's *Supreme Court of the United States*, pp. 66-76.

²⁰ See appendix to this article, p. 357.

The method of settling controversies between the States by means of temporary commissions thus passed out of existence, giving birth to a permanent judiciary, invested with the power to determine such controversies, as appears from Article 3, Section 2, of the Constitution as ultimately adopted:

The judicial power shall extend * * * to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

It is interesting to note in this connection that Mr. Rutledge, who moved to strike out because the procedure under the Articles of Confederation "will be rendered unnecessary by the National Judiciary now to be established," and Mr. Wilson, who urged the striking out, "the Judiciary being a better provision," were lawyers by profession and men of judicial experience. The first, John Rutledge, became Chief Justice of the Supreme Court, which he helped to create, and the other, James Wilson, became a distinguished Justice of the same august tribunal.

Thus, arbitration between the States by means of a temporary tribunal composed for the particular case developed into a permanent tribunal for the settlement of controversies between the States of the American Union. Its success in this capacity has justified the expectations of its founders. It has received and passed upon many a dispute, which, to quote the impressive language of Mr. Justice Holmes, "If it arose between independent sovereignties, might lead to war."²¹ We can not resist the question, Will history repeat itself? We have seen self-redress yield to arbitration by private contract, then arbitration recognized by the state, then a permanent panel formed from which the judges should be selected, then finally a permanent national judiciary; and we note arbitration between states by means of a temporary tribunal composed of temporary commissioners or judges developing into a permanent judiciary international in character and operation so far as the states composing it are concerned.

²¹ *Missouri v. Illinois*, 200 U. S. 496, 518.

The development in the case of Rome was slow and unconscious. The development between the States of the American Union was unconscious but rapid. May we not hope that the course of judicial development, which resulted in a national tribunal for citizens of one and the same state, and which created a permanent international tribunal for thirteen states, now fortunately forty-eight in number, may culminate as naturally and logically, if not so unconsciously, in the establishment of a permanent international court composed of judges acting under a sense of judicial responsibility? The current of history is with us, and although the stream may be stemmed for a time, obstruction must needs be futile.

JAMES BROWN SCOTT.

APPENDIX.*

ORDER OF EXTRACTS

1. Selection from Matthiass.
2. Selection from Maine.
3. Selection from Jhering.
4. Selection from Moyle.
5. Selection from Madvig.
6. Selection from Roby.
7. Selection from Articles of Confederation adopted by the States of America on July 9, 1778.
8. Selection from Report of the Committee on Detail, presented by Mr. Rutledge to the Federal Convention, August 6, 1787.
9. Selection from Proceedings of the Federal Convention, August 24, 1787.
10. Selection from Constitution of the United States.
11. Selection from the Convention for the Pacific Settlement of International Disputes, adopted at The Hague Conference of 1899.

DR. BERNHARD MATTHIASS: *DIE ENTWICKLUNG DES RÖMISCHEN SCHIEDSGERICHT*. Rostock, 1888, pp. 5-18.

The definite time in history to which we must turn for information in regard to the development of the arbitral court in the Roman law is fixed by the regulation of that court in the prætor's edict. On this regulation rests its development in subsequent times. The prætor's regulation itself rests in turn upon the clearly defined popular custom which it presupposes as its necessary foundation—a custom which in contradistinction to the existing state administration of justice, arose out of the needs of life. But, as is well known, the subject takes us further back, even to the threshold and beginning of the development of Roman law. Here we shall pause for a moment. The function and form of the oldest arbitral

* The footnotes printed in this Appendix are the original notes appearing in the volumes from which the extracts are selected.—J. B. S.

court are not so completely removed from our knowledge but that we might be justified to draw therefrom a more complete idea, even if not an absolutely correct one, of the oldest Roman judicial proceeding. The arbitration of controversies can be proved to have existed in the earliest historical times; it is an institution which was known to the primitive Indo-Germanic peoples, and its antiquity becomes comprehensible to us, when we consider it as a symptom of a definite period of civilization during which the transition from self-help to state-help was being brought about. We assign its rise to an epoch during which the universal obligation of judicial methods gradually gained strength, when the general disapproval of conduct contrary to these methods became correspondingly pronounced, and when the estimation of the value of life and of the properties that supported life asserted itself vigorously and was the chief factor in influencing the contending parties to desist from personal conflict. The contending parties addressed themselves to a trusted friend. The latter decided which of the parties was wrong. This decision was effective to the extent that the defeated party, if unwilling to submit to the decision, still further aroused the disapproval of the witnesses who, in consequence, were the more disposed to help the victor in the absolute execution of his right. The moral position of the victor was strengthened when the sentence was rendered by an authority, secular or religious (chieftain, king, priest) recognized by the witnesses. Knowing the earliest function of the arbitral court, we ought to be able to determine the form of this oldest arbitral court. In the state of civilization with which we are dealing, it was self-help, that is, physical combat, which originally decided the dispute. If the contending parties appealed to a trusted person they merely gave up the personal encounter, in the place of which there now appeared the assertion by each party that he was right; in other words, contending opinions took the place of personal conflict. Each of the parties had to show evidence of the earnestness of his opinion and of his firm belief in his contention, else there would have been no inducement why he should surrender his right to self-help. Substitution of personal opinion was appropriately followed by a deposit made with the trusted party; this deposit, which the trusted party was to surrender to the victor, constituted the penalty that the defeated party incurred. By this penalty the victor obtained satisfaction for the establishment of his claim. Thus, we see that the parties made a wager and that the oldest form of arbitral court was the wager-court. The decision of this wager-judge established that the victor had the moral right to resort to self-help. This a priori construction agrees indeed with the fact that the wager settlement was a feature of the primitive Indo-Germanic law. We find it among the northern nations and among the Greeks and Romans,¹ in exactly the form of the wager which we have described. Every wager, however, requires a decision, which can only be reached through a chosen, impartial agent, so long as a state tribunal is not available. The hypothesis that this old popular custom of settling differences of opinion by means of a wager developed out of an agreement, and that the latter was concluded with regard to an eventual removal of self-help and personal conflict, cannot be proven directly. The state of civilization and the needs of the parties led to the adjustment of the contest of opinion in the form which we have called a wager, and the form established in this way could later on be resorted to for the adjustment of other disputes. It is certain that both kinds of wager-agreements stood in sharp contrast with each other; in the one, there was involved only the determination of the truth of the assertions, while in the other, it was also necessary to execute the decision, either through the willingness of the defeated party or through self-help.²

¹ Cf. *Bernhöft*, *Zeitschr. für vergl. R. W.*, II p. 321 seq., also *Post*, *Anfänge des Staats- und Rechtslebens*, p. 247 seq.; also the etymology of *arbiter* supports my assumption: *arbiter* (derived from *ad* and *bitere*) is he who proceeds to a question. Even in Cicero, it is repeatedly used in the sense of *testis*, the eye-witness. It is this very quality which makes of him the impartial factor in the wager.

² I shall, of course, not assert that the original arbitral-court constantly ap-

In this fact, we find the seed of subsequent development. It has already been briefly mentioned elsewhere that the contending parties addressed themselves to a judge to award the wager who was the representative of an authority, either religious or secular, then existing in the community, or in the process of development. The advantages of this are obvious: the arbitrator possessed legal knowledge and impartiality; his decision carried the necessary weight; the arbiter had at his disposal the moral or physical means, either to bring about the voluntary fulfillment of the decision or to compel it from the recalcitrant. The appeal to such authorities led of necessity to the situation where the arbiter became the judge, and this process was brought about all the more surely when the arbiter himself was interested in increasing his authority. This course of development necessarily led, little by little, to a modification of the primitive wager. Self-help was now in principle done away with through the development of law and of state-help. The ancient contest of opinion had in consequence lost its practical significance; and although the form of the wager was preserved, the new wager was merely a method of procedure. In like manner, the function of the wager (stake) changed. Whenever the authority that was appealed to guaranteed the execution of its decision, the stake could be considered as performing a function of an equivalent of the sum awarded to the arbiter. It would, of course, not be against the spirit of the wager if the amount thereof were adjudicated to a third party. Even as is the case at present, the victor might find his satisfaction in that a third party profited by the decision. It was all the more possible to continue to characterize the arbitral agreement between the parties as a wager. But what materially contradicted the nature of the wager agreement was the circumstance that the aims of the parties were no longer satisfied with the object of the wager. The wager was only resorted to, to settle finally the situation which formed the object of the wager. If, however, on the one hand, the idea of satisfaction in the wager was relegated to a secondary position, while, on the other hand, the function of the wager as the fee for the arbiter assumed first importance, it becomes very clear that with the increasing authority of the arbiter the latter determined the amount of the wager, and that this amount became modified in substance and in spirit because of the pressing interests of the arbiter, interests which may not have been merely of a selfish character. This second period came to an end with the development of the public court and lawsuit from the arbitral court. This public lawsuit may retain the forms, and, along with them, the wager of the arbitral lawsuit, and may even further develop them. The oldest tradition of the Indo-Germanic nations seems to me to point to a remarkable coincidence with this course of development.

The Indian law¹ enables us to follow up the series of developments described from the time when the wager changes to a proceeding in law. But, for the moment, let us consider a passage from the Civil Code of the Nārada:²

"In a lawsuit attended by a wager, he of the two who is cast must pay his stake and a fine when his defeat has been decided."

It is significant that the lawsuit is instituted by means of a wager. It points to a time when a real wager was entered into in the presence of a chosen arbiter. How far this lawsuit wager is removed from this early period depends on the

peared in the form of the wager-court illustrated in the text; but, that this form appears as one perfectly adequate for the times, and therefore, that it was probably in very frequent use. The form of the arbitral-court conjectured by *Muther*, *Sequestration und Arrest*, p. 8 seq., in regard to movable property seems to me, however, not in any way to meet the conditions of the period to which we have referred.

¹ This evidence was kindly communicated to me by my colleagues, *Bernhöft* and *Jolly*.

² Information furnished by *Jolly* from his translation of the larger Nārada (page 6) which, already in print, is to appear at Oxford in the *Sacred Books of the East*.

answer to the question to whom the amount of the wager is to be paid. Jolly has furnished me with an abstract of an explanatory note to his translation, containing the commentary of Asahāya upon this passage: "Asahāya does not say to whom the sum staked has to be paid in his opinion. It may be observed that, according to Burmese law, which is an offshoot of the early law of India, ten per cent. of the sum staked should be given to the judge and to the pleaders, and the remainder to the victorious party. See Richardson's *Damathat*, page 73, *Yājñavalkya* II, 18 (See *Mitāksharā*)."

Accordingly ten per cent. of the stake goes to the judge and the advocates and ninety per cent. to the victorious party; and this according to Burmese law, which is derived from the old Indian law. If we consider the small percentage of the stake which goes to the judge and the advocates, then we are well-nigh compelled to come to the conclusion that formerly this lawsuit wager was a real wager. But, the passage points as well to that further development in the course of which the judge alone lays claim to the amount of the wager. I shall not enter into an examination of the penalty which the defeated party, in the passage quoted from the *Nārada* and elsewhere, may have to pay; for it must be admitted that other developments besides the one that I am at present considering are taking place, but need not now be discussed. In support of the above conclusion, an old legal principle, quoted as Jolly thinks in the same commentary of Asahāya upon *Nārada*, should be here considered: "If a complainant or an accused person who feels that he can carry through his cause, stipulates a sum proportionate to his fortune, then this is called 'wager' (*pana*)."¹ Moreover, my assumption is at any rate supported by the passage in the *Yājñavalkya* II, 18, which Jolly resorts to in the note to *Nārada* above quoted. This passage, in the translation by Stenzler, reads as follows:

"When a wager was connected with a lawsuit, then the judge shall cause the defeated party to pay the penalty and his wager to the king, and the money to the creditor."

The words "to the King" are not found in the original text translated by Stenzler. The question is whether they ought to be supplied. Their insertion is found in the *Mitāksharā* from which Stenzler has translated, as well as in two "very inaccurate" Calcutta editions by Jolly, and rightly so, Jolly thinks, because the construction demands this insertion which, for other reasons as well, he believes to be necessary. To be sure, Jolly sets against his own opinion that of Mandlik, the Indian translator of the *Yājñavalkya*, who in his translation (Bombay 1880) adds the words "to the King" in parenthesis, but states in another note: "this couplet refers to cases in which the plaintiff or the defendant, or both, agree that the defeated party shall pay to the successful one a sum of money." However this may be, if those uncertain words were wanting, the passage would preserve the lawsuit wager in its purest and most adequate form, that is, the primitive wager before the arbiter, and later interpreters only would, according to this, have introduced into the old text later legal constructions. But, if those words were contained in the text of the *Yājñavalkya*, then the passage quoted gives us information regarding the later stage of development of the lawsuit wager and offers us a remarkable analogy to the Roman *legis actio sacramento*.²

The wager as a proceeding in law plays a great rôle in the old Swedish and old Norwegian law,² while it was unknown to the Icelanders and to the Danes. In the old Swedish laws, as Amira remarks, the legal function of the wager "is

¹ Also a note by Kohler in regard to the Chinese Civil Law, *Zeitschr. f. vgl. R. W.*, VI p. 386: "Each of the parties to the lawsuit brings along a quantity of gold or metal and a bundle of arrows," and this additional observation: "Hence, the universal appearance of the lawsuit-wager, the *summa sacramenti*" is true even here.

² I am indebted to my colleague, K. Lehmann, for this information from the literature of Norse law.

mainly represented by its use in lawsuits." At times, the parties to the lawsuit wager against one another in regard to a state of fact that may be ascertained by actual observation, for instance, titles relating to the ownership of land or the result of a proposed searching of a house; on other occasions, the party against whom a judgment or a verdict is rendered by the jury wagers against the judge or against the jurymen. In the latter cases, the wager appears as the form in which the sentence is executed. The connection between the lawsuit wager and the simple wager before the arbiter cannot, to be sure, be established in the case of Sweden; but according to what has already been said, it is not improbable.¹ On the other hand, the appearance of the wager in the ancient Norwegian private courts (*skiladomar*), which represent the transition from the arbitral to the strictly public judicial proceeding, points strongly to such a connection. In this case when a unanimous decision cannot be reached, the private judges chosen by each party wager against each other. The "Thegn Court" decides which body of private judges has rendered the just sentence. The defeated body of private judges forfeits to the victorious party the wager which has been deposited in the meantime with a third party. If now we consider the peculiar position of private judges who, to a certain extent, make the cause of the parties their own, it will be seen that the wager between the judges eventually turns out to be a wager between the parties themselves.² In reality, as we have already shown, the respective parties paid the amount of the wager.

Homer has handed down examples of the actual wager as well as of the wager for the purpose of the decision regarding controversial legal claims on the ground of self-help. The wager between Idomeneus and Ajax (*Iliad* 23, 485 seq.) deals with the victory of the betters in the chariot races. The challenge for a wager on the part of Idomeneus clearly defines the point in dispute (*ὁπποῦτεραι πρόσθ' ἵπποι* — whichever horses come first), the stake (*ἡ τρίποδος περιώρμεθον ἢ ἑ λίσθητος* — let us wager a tripod-kettle) and the person of the proposed arbiter (*ἴστορα δ' Ἀτρεΐδην Ἀγαμέμνονα θέομεν ἀμφω* — let us appoint as judge Agamemnon son of Atreus). *Ἴστωρ* [*εἰδέναι*] (the judge) is he who knows from personal observation: the witness of the contest is the natural arbiter in the actual contest and in this case in respect of the wager he is the arbiter of the issue of the contest. It is brought out not less sharply that the loss of the stake by the defeated party is intended as satisfaction for the victor (*ἵνα νῆς ἀπορίων* — in order that by paying you may recognize). In the second passage (*Iliad* XVIII, 497 seq.), the question concerns a real legal controversy, the payment of a satisfaction (*εἵνεκα ποινῆς* — as quit-money) which the obligated party pays, and which the plaintiff claims not to have received. Plaintiff and accused who are agreed that an arbiter shall decide (*ἐπὶ ἴστορι πείραρ ἰλεῖσθαι* — to reach an issue by a judge) supported by helpers, voluntarily address themselves to the *γέροντες* (elders), that is, those versed in law. Each of the elders, who are seated on stones within the sacred circle, renders his decision. Two talents of gold are placed within the sacred circle, (*τῷ δόμεν δὲ μετὰ τοῖσι δίκην θύοντατα εἰποι* — we give them to him who shall give judgment most fairly). Each party has deposited as we see a stake. It is the old wager stake which has, however, already assumed the character of the equivalent of the arbitral sentence, particularly if we grant that the wager of the victor also reverts to the judge. The description leads closely up to the boundary between the arbitral court and the public court.

In a no less striking way the development above described is, in my judgment confirmed by the forms of the Roman *legis actio* proceedings. These forms point

¹ Cf. v. *Amira*, *Altschwedisches Obligationenrecht* 1882, 32. Emil *Wolff*, *jemförande ratts-historiska studier till de tolf talsornas Lag*, Göteborg 1883, p. 61 seq., the latter of which, from the comparative view of law, points moreover to the analogy with the *legis actio sacramenta*.

² E. *Hertzberg*, *Grundtrækkene i den ældste norske Proces*, p. 15-71. Fr. *Brandt*, *Forelæsninger over den norske Retshistorie II*, pp. 298-304.

to a time when the enactment of laws and their administration belonged primarily to the pontifex. If now we ask how these forms could be developed, the answer given to this question by Jhering* will no doubt be conclusive: when the legal council took a hand in private matters there was developed the judicial power of the pontifices as arbiters between the parties, and their decision was supported by the agreements between the parties, but in addition by the authority of the pontifices which existed already. Their authority then came to have this additional effect: the pontifical court "assumed completely the position of a court instituted by the state," a position which was granted to it in fact, and which the court was greatly interested to maintain.** The religious sense of the people had from time immemorial established the indissoluble connection between law and religion; the priest was looked upon as the guardian of the standards of life; he was, moreover, the (~~law~~ — judge) in law. Concerning the form in which arbitral proceedings were instituted, Jhering, according to my judgment, gives no satisfactory explanation. He does, to be sure, grant that the controversy before the arbitral pontifex was entered into by the deposit of a *sacramentum* by both parties, but he believes that the *sacramentum* is worthy of consideration *only* from the point of view that it is the fee, the compensation, that is, the money consideration to be paid to the pontifices. I believe that originally a much deeper juridical significance attached to the *sacramentum*. The original idea was a wager put up by both parties to insure the arbitral proceedings. In the beginning, the victor probably carried away this wager, the wager itself was first of all only a security for the parties. But, since in virtue of his authority the pontifex was at an early period in a position to guarantee the realization of the arbitral decision, the wager of the defeated party could therefore more and more assume the character of the fee that was to be paid to the arbiter. The deposit of the wager remained the means for bringing the process to a hearing before the arbiter. The priestly arbiter, however, gained an increasing influence with regard to the form of this wager. Wager and wager-stake received sacred characterization and significance; the wager-stake was fixed at a definite sum proportionate to the object of the controversy; and whilst in earlier times, the parties designated the person of the priest by election, they appealed later on to the whole college of the pontifices which delegated unilaterally a member from its own number and finally, in an arbitrary manner and for all cases, entrusted one of its members with these and other cases relating to the administration of private law.¹ The secular *legis actio* proceeding appears, therefore, as a direct continuation of the pontifical procedure, which grew out of the arbitral procedure, and its connections with the latter was only gradually removed. The partial and later development of the *legis actio* procedure clung to the idea of the *sacramentum* as a wager-stake, that is, wager-penalty (*poena*), as is indicated by the well-known examples from Varro, I. 1. 5, 180, Festus *v. Sacramentum* and Gajus 4, 13 ff., particularly however, the words of Isidor, orig. 5, 24, p. 930: "*sacramentum est pignus sponsionis*."² The formal proceeding in the *legis actio sacramento* corre-

* (2) Geist des röm. Rechts (3rd ed.) I, p. 297 seq.; Bernhöft in Zeitschr. für vergl. R. W., II, 325, seq., 321, and in Staat und Recht, p. 227 seq. But cf. Mommsen, Staatsrecht II, Sect. 1, p. 44, p. 45, note 3.

** Bernhöft (in Staat und Recht, p. 227 seq., 113 seq., 119 seq.) assigns to the king of the pre-Roman time a similar function as arbiter.

¹ This is corroborated by the account of Pomponius in L. 2, § 6, D. (1, 2) regarding the "*præcesse privatis*;" this account should, however, be compared with Mommsen, Staatsrecht II, Sect. 1, p. 45, note 3.

² A. Pernice, zum röm. Sakralrecht I, p. 18, Note 5, points rightly to the analogous interpretation by Servius, Eclog. 3, 31. On what ground, Rudorff, Zeitschr. für gesch. R. W., Vol. 13, p. 199, Note 36, assumes that Isidor has in mind the corroborative oath and that its source is the *sacramentum* proceeding, he does not indicate.

sponded fully to that of the real wager, and in my judgment it was not by mere chance but by historical tradition that the *lege agere sacramento* preserved together with the wager, the relations to the condition of self-help,³ which was not undervalued. Modern writers maintain the view that in the *legis actio sacramento* a wager was entered into to secure the hearing of the lawsuit.¹ But, in these authors I miss the explanation of this particular form of the lawsuit. The original form of the lawsuit may be explained, to be sure, by the spirit which pervaded antiquity; but was it necessary to resort to the method of the wager, or was this done because it had been an old Roman custom? The wager, in the abstract, is certainly far removed from the forms of the lawsuit. For this reason, the thought forces itself irresistibly upon the mind, that this final wager was the relic of a real wager of an earlier period.²

It is quite possible that the wager before the pontifices was not made through stake (*sacramentum*), but through mutual solemn promise (*per sponsionem*); for the solemn form of promise of the *sponsio* developed from the sacred law; when its sacred character was removed and it became secularized,³ it served more especially the ends of the wager agreement. According to this view, the later *agere per sponsionem* would have its historical predecessor in the old wager *per sponsionem* before the pontifical arbiter.

SIR HENRY SUMNER MAINE: ANCIENT LAW (1861, Pollock's Edition, 1906), pp. 362-364.

How little the notion of injury to the community had to do with the earliest interference of the State *through its tribunals*, is shown by the curious circumstance that in the original administration of justice, the proceedings were a close imitation of the series of acts which were likely to be gone through in private life by persons who were disputing, but who afterwards suffered their quarrel to be appeased. The magistrate carefully simulated the demeanour of a private arbitrator casually called in.

In order to show that this statement is not a mere fanciful conceit, I will produce the evidence on which it rests. Very far the most ancient judicial proceeding known to us is the *Legis Actio Sacramenti* of the Romans, out of which all the later Roman law of Actions may be proved to have grown. Gaius carefully describes its ceremonial. Unmeaning and grotesque as it appears at first sight, a little attention enables us to decipher and interpret it.

The subject of litigation is supposed to be in Court. If it is movable, it is actually there. If it be immovable, a fragment or sample of it is brought in its place: land, for instance, is represented by a clod, a house by a single brick. In the example selected by Gaius, the suit is for a slave. The proceeding begins by the plaintiff's advancing with a rod, which as Gaius expressly tells symbolised a spear. He lays hold of the slave and asserts a right to him with the words, "*Hunc ego hominem ex Jure Quiritium meum esse dico secundum suam causam sicut dixi*;" and then saying, "*Ecce tibi Vindictam imposui*," he touches him with the spear. The defendant goes through the same series of acts and ges-

³ See especially Bernhöft, *Staat und Recht*, p. 226 seq.

¹ Keller (Wach.) *Der röm. Civilprozess* (6th ed.), p. 57 seq. Bernhöft, *Staat und Recht*, p. 229, Brinz, zur Contravindication der *legis actio sacramento*, espec. p. 113 seq. und p. 146. Baron, *Festgaben für Heffter*, p. 38 seq.

² With regard to the compendious literature relating to the *legis actio sacramento*, I will take this position: Even among those who absolutely deny the wager nature of the *sacramentum*, we find repeatedly interpretations, which of necessity, lead to our view (*Stintzing*, Ueber das Verh. der *leg. a. sacramento*, etc., p. 9 seq.); if, moreover, these authors should have succeeded in proving that the legal procedure of the *sacramentum* is not in all respects a real wager, this would after all not constitute a denial of my view.

³ Cf. now A Pernice, *zum röm. Sakralrecht*, I, p. 17.

tures. On this the Prætor intervenes, and bids the litigants relax their hold, "*Mittite ambo hominem.*" They obey, and the plaintiff demands from the defendant the reason of his interference, "*Postulo anne dicas quâ ex causâ vindicaveris,*" a question which is replied to by a fresh assertion of right, "*Jus peregi sicut vindictam imposui.*" On this, the first claimant offers to stake a sum of money, called a Sacramentum, on the justice of his own case, "*Quando tu injuriâ provocasti, D aeris Sacramento te provoco,*" and the defendant, in the phrase, "*Similiter ego te,*" accepts the wager. The subsequent proceedings were no longer of a formal kind, but it is to be observed that the Prætor took security for the Sacramentum, which always went into the coffers of the State.

Such was the necessary preface of every ancient Roman suit. It is impossible, I think, to refuse assent to the suggestion of those who see in it a dramatization of the origin of Justice. Two armed men are wrangling about some disputed property. The Prætor, *vir pietate gravis*, happens to be going by and interposes to stop the contest. The disputants state their case to him, and agree that he shall arbitrate between them, it being arranged that the loser besides resigning the subject of the quarrel, shall pay a sum of money to the umpire as a remuneration for his trouble and loss of time.

RUDOLF VON JHERING: *GEIST DES RÖMISCHEN RECHTS*, Vol. 1 (Fifth Edition), Leipzig, 1891, pages 167-176.

PEACEFUL ADJUSTMENT OF LEGAL CONTROVERSIES.

Contractual adjustment of legal controversies—Oath and Arbitration—Submission to judicial decision (litis contestatio).

The need of a decision of legal controversies has not been met everywhere in the same manner. Some peoples address themselves to the Deity for this purpose; the Deity renders the decision through judgments of God, oracle, lot, etc.; others appeal for help to the civic authorities. In both cases, however, the parties submit to a *higher* power. The Romans of olden times took an entirely different course; and the development in the course of time was unable to eradicate this ancient spirit, which leaves the decision of legal controversies to mutual agreement. The party whose right was disputed by his opponent proposed to the latter arbitration by an impartial third party, or else left the decision of the matter in dispute to his opponent's conscientiousness, that is, he requested him to declare under oath the non-existence of his right.⁷⁰ If the opponent accepted either the one or the other proposition, the further course followed naturally; the decision rendered by the arbiter, or under oath, was based upon mutual agreement; it was, therefore, binding upon both parties; it established an undoubted right, and consequently the legal power of self-help. But, what became the situation when the opponent declined to accept the proposition of the claimant? By his refusal he passed judgment upon himself; for, why refuse if he was convinced of his right? He showed that he had no confidence in the righteousness of his cause; and no injustice was shown him who thereby cut off every chance for a decision if in his refusal there was found an indirect confession of his guilt.^{70a} Self-help (if not quite the *legis actio per manus injectionem*) had free play against him.^{70b}

⁷⁰ This viewpoint, where the complainant appoints his opponent under oath as judge is frequently expressed, I. 1. pr. Quar. rer. (44.5) *Jusjurandum vicem rei judicatae obtinet, non immerito, cum ipse quis judicem adversarium suum de causa sua fecerit deferendo ei jusjurandum.* L. 28, § 2 de jud. (5.1). Quintil. I. O. V. 6., § 4. *litis adversarium judicem facit.*

^{70a} Liv. III 57 *si ad judicem non eat, pro damnato in vincula duci jubere.* L. 38 de jurejur. (12.2): *manifestae turpitudinis et confessionis est nolle nec jurare nec jusjurandum referre.*

^{70b} According to the Twelve Tables: *Si in jus vocat, ni it, antestator; igitur em capito; si calvitur pedemve struit, manum endo jacio.*

The institution of arbiters, as well as the extra-judicial oath, set aside the practice of self-help by affording to the presumptive claimant the possibility either of bringing the dispute to a decision, or at least of forcing the opponent morally to the wall, and to compel him by his refusal to the indirect confession of his unjust claim. In even a later period of Roman history both systems were unusually popular and customary,⁷¹ and both in solemn form reappear in later Roman judicial proceedings. In the latter system I see nothing else than the residuum, reduced to regular and permanent form, of the custom which had long before existed, where the parties themselves decided legal controversies by agreement. The extra-judicial oath becomes the judicial oath, the arbiter becomes the public judge, and neither of the two loses (surrenders) the former character.

Our present-day judge derives his authority from the state, not from the voluntary acquiescence of the parties; and his authority does not merely consist in ascertaining or in interpreting, but in carrying out the law.

The Roman judge was not invested with this function; he exercised the same functions that belong to every arbiter. The striking similarity between the two led a Roman jurist to remark: *Compromissum* (selection of an arbiter) *ad similitudinem iudiciorum redigitur*. In later times it may have seemed natural to look upon the judicial office as the original of which the institution of arbiters was only the copy.

It may have occurred frequently that the parties sought arbitral decision from a magistrate who had distinguished himself by his knowledge of the laws or by his integrity. Fulfillment of their wishes, in so far as the magistrate was concerned, was originally looked upon as a matter of honor; in time it became his official duty.^{71a} An overwhelming number of such requests led the magistrate to suggest in his place some other qualified person, as well as to refuse, once and for all, to hear many controversies. If the later law restricted the number of cases to be heard, then the earlier law must have heard fewer yet. The sole difference between the ordinary arbiter and the arbiter designated by the magistrate, or the magistrate himself when he decided that the question was within his own jurisdiction is, that the former had first to be requested to take charge of the case, while the latter's cooperation was certain wherever custom or law had established his official function; in all other respects they were equals. The arbiter owes his power to the choice of the parties; he is merely their agent; his function solely consists in pronouncing sentence; the carrying out of this sentence is left to the parties themselves. In like manner, the judge of the old Roman law derives his authority only by appointment of the parties. This is clearly proven by the fact that a legal controversy cannot be instituted when the opponent refuses his consent thereto. A decision of the magistrate or of the judge designated by him, to which the opponent has not in advance subjected himself, is not binding upon him. The dispute, which the opponent has with the claimant is simply a private affair; how could the magistrate, without invitation of both parties, be permitted to interfere? Therefore, if the accused refuses, a legal controversy can not at all be instituted against him; the complainant must seek redress as best he can; and he does this, as we have seen above, by resorting to the *manus injectio*. If the accused declines

⁷¹ O. E. Hartman, the 'Ordo iudiciorum' I, p. 105 et seq.

^{71a} The following exposition, taken unchanged from the first edition, in so far as it bears upon the objections raised against it, merely serves the purpose of a hypothetical construction of antiquity and of the ideas by which it was ruled. In historic times, the *imperium* of the king or of the magistrate clothed with the *iurisdictio* is in too great contrast with the position assigned in the text to the judge to permit our attempting to place both on a par. The order of the *Prætor* in a suit for libel: *mittite ambo hominem* shows plainly that he did not derive his authority from the parties, that he was not their agent, but their superior.

the proposition of the complainant to submit to judicial decision, the latter, in such case, need not heed the wishes of the accused should he desire to take the case up again; self-help has free course.

If a legal controversy cannot be instituted without the consent of the accused, we may then infer what the situation will be when he consents to a legal controversy. The entire proceedings rest upon the contract of the parties. Both agree upon the arbiter whom the magistrate is to designate,⁷² and they promise to each other to abide by the decision. The authority to decide the case proceeds, therefore, not from the fact that the judge is a public officer, but from the fact that he has been chosen by the parties. We may designate their contract as a conditional promise; they promise that the victor is to have possession of what the judge shall decree in his favor.

The consequences of this conception are strictly followed out in the older proceedings. The old obligation is considered extinct; in consequence the complainant can no longer abandon the (old) complaint and prepare a new one; nor can the accused in doing the required act avoid condemnation. In the place of the old obligation, a new one, a conditional one is instituted, brought about by the contract of the parties; henceforth, they have only to wait for the fulfillment of the condition. Since this new obligation is based upon a contract, the old one, therefore, if it arose from a crime, assumes through this metamorphosis all the peculiarities of obligations resulting from contracts; for instance, it becomes transferable, a quality it had not possessed before.

The contract, which in this way is made the basis of the entire proceedings, is called *Litis contestatio*; it was concluded in the presence of the Prætor and of witnesses (*contestari*). The nature of contract of the *Litis contestatio* has been denied and contrasted with the "Natur des Processes" (= nature of the legal controversy), from which, of necessity, it is said, the *Litis contestatio* results: as if the old Romans had viewed the nature of the legal controversy as we do; as if, where we of to-day are forced to accept obligations and submit to penalties, the Romans had not first of all demanded to see the expressed, even though indirectly compulsory, consent of the parties. It is in my judgment absolutely opposed to the spirit of the older law, that the *Litis contestatio* should have entailed all the consequences of a contractual relation, and not have been itself a contract. Let us understand that the *Litis contestatio* did not involve "submission" to the judge, and that the judicial sentence was only a condition under which the parties made some mutual promises. If they had based their promises upon "if a third party should do this or that," then, upon the appearing of the condition, the obligation rising into being would not have its basis in the act of the third party, but in their own promise. In like manner, the force which the judicial sentence possesses is to be traced back to the contract between the parties as to the true cause.

The relation of the parties to the judge is, therefore, nothing less than subordinate. His quality as a judge designated by the Prætor implies as little of such subordination as nowadays in the case of persons appointed by the state to pursue some profession in the interest of the public. The ancient judge in the time of the Roman emperors was nothing more than a jurist clothed with *jus respondendi*. Both were appointed by the state to serve the parties in rendering a judgment.⁷³ For this reason the judge cannot in the course of the legal con-

⁷² *Neminem*, says Cicero *pro Cluentio* c 43, *voluerant majores nostri non modo de existimatione cujusquam, sed ne pecuniaria quidem de re minima esse judicem, nisi qui inter adversarios convenisset.*

⁷³ Their origin is historically the same. Just as the state assumes the office of arbiter, without at first changing the nature of that office so the responding jurists were instituted. By the side of the public judge and the respondent there are actual arbiters and respondents not clothed with the *jus respondendi* and existing for sometime without legal attribution, until such attribution is at last conferred upon them, and judges and public respondents in the name of the state pronounce judgment possessing legal force.

troversey impose obligations upon the parties, cannot summon them to appear, cannot threaten them with punishment in case of nonappearance, etc. * * * Therefore, the veto of the tribunes, which may be exercised against the magistrate intrusted with the administration of justice cannot be exercised against the judge; he is no public official, but an arbiter between the parties in the appointment of whom a public official has coöperated.

For this reason the judicial sentence is not an order or injunction against the losing party, but merely an opinion "*sententia*," an explanation "*pronuntiatio*," which the judge renders in the controversy. This is most clearly seen in the oldest form of legal controversies, the *legis actio sacramento*. The legal controversy appears here in the form of a security and each party deposits a definite sum of money (*sacramentum*),⁷⁴ which the defeated party loses. This security is submitted to the decision of the judge, who declares as *justum* the *sacramentum* of the party which in his opinion is right, and, therefore, as forfeited the *sacramentum* of the other party. This decision says nothing of condemnation; the claim which gave rise to the legal controversy is not even referred to in the judgment: judgment is rendered in regard to a matter quite different from the one at stake between the parties, the latter being only indirectly decided. But, that the idea of condemnation is little present in this indirect decision is best shown by the fact that recourse to this form of legal controversy occurred where condemnation or carrying out of a judgment could not be thought of, because the question at issue had nothing whatever to do with a legal claim, but related to the proving of some assertion.⁷⁵ Even in the later law, a similar form of judgment, the *pronuntiatio*, was kept alive in many cases, particularly in cases where pecuniary considerations did not obtain: the judge merely decided that a person was *servus*, *libertus*, *ingenuus*, etc., and left it to the party interested to infer and to realize the practical effects resulting therefrom.

By the side of these forms of judgment we find another one, the *condemnatio*, but only in the later forms of the *Legisactio* controversy. In the former cases the judicial judgment is objective: it is left to the party to deduce the practical consequences, and if needs be, to reach an agreement in regard to the *litis aestimatio*, the estimating of the adjudicated object; but in the *condemnatio*, the judge renders a relative decision: he condemns the accused; moreover, he combines at the same time with it, in all complaints referring to an object that may be estimated in money value, the *litis aestimatio*, that is, he condemns at the outset to the payment of a sum of money.

The judge of the old law, therefore, imposes no obligation upon the accused; he issues no order against him in the name of the state; but with his knowledge of the law he comes to the assistance of the parties. The judgment has appropriately expressed the relation of the judicial function to that of the complainant. The judge is merely to indicate the law (*dicere*), hence he is called *judex*, and he does this by rendering his opinion (*sententia*). On the other hand, the complainant is the acting party (*actor*);⁷⁶ he does actually "act," for he takes in "hand" (*manum injicere, conserere; vindicare*), depending on whether the legal

⁷⁴ For particulars in relation hereto, see § 18a.

⁷⁵ *Valerius Maximus* Lib. II, c. 8, no. 74 reports, that the dispute between a Consul and a Praetor as to which of the two deserved credit for a victorious naval battle, and to whom therefore, should have gone the triumph, became in this manner the object of a legal controversy; instead, however, of resorting to the older form of the *sacramentum*, they accepted the newer one of the *sponsio*. *Valerius sponsione Lutatium provocavit: "ni suo ductu Punica classis esset oppressa." Nec dubitavit restipulari Lutatius. Itaque judex inter eos convenit Atilius Calatinus.* The latter concludes his decision with the words: *secundum te litem do.*

⁷⁶ Even in *jurgare, litigare*, it is equivalent to *agere*; but in the second word it must not be interpreted in the sense of *litem agere*, but as *lite agere* (just as *jurgare* means *jure agere*).

controversy is instituted against persons or things (*agere in personam, in rem*). The present-day judge "rights" (= judges), that is, he is the acting party, while the complainant does not act, but presents his grievance to the judge, so that the latter may help him. The Roman complainant does not depend on assistance; in all cases where his right is evident he has no need of the judge, but proceeds forthwith to self-help. The Roman judicial office is, therefore, only instituted to afford opportunity to the parties in doubtful cases, to have the law indicated. But the judicial decision exercises no effect, which the parties might not just as well obtain by some other course; and the reason why it possesses no deciding force lies not in the public character of the judicial office, but in the will of the parties. The judge, therefore, is nothing else than an arbiter (*arbiter*); and there were many cases in which he was referred to by that name.

If now, we cast a retrospective glance upon the course we have followed in this first chapter (§ 10 et seq.), we will see that it leads us from that lowest point, where self-help and the despoiling of the opponent by brute force prevail, where right and force still coincide, to the moment where force exercised in favor of a claim which is looked upon as doubtful is considered as unsatisfactory, and decision of legal controversies by contract lays the first foundation for the institution of the judicial office. But there remained always with us one and the same idea, namely, that personal force is the originator, and, therefore, also the legitimate protector of right. This force is not the open physical force, but by the recognition of its justice it rises to a moral force; it is a force actively engaged in the service of the concept of right, ay, the principle of private right itself in its primitive freshness and energy.

The idea of justification of personal force, which by its own act creates and protects a world of its own, is the absolute minimum with which the institution of law could begin; and, for this reason, it had to be placed at the very beginning of our exposition. Out of this feeble germ, law has also been evolved by other peoples; but not everywhere are we so fortunate, as in the present case, as to be able to trace the original germ through the blossom and the ripened fruit. Unable to reconcile that idea in the course of time with the rising development of the State-principle, many a people disregarded that idea and by meek humiliation of the personal feeling of self-assertion and of the sense of justice, accepted the state as the real creator of subjective right. But, in the Roman conception of right — thanks be to its indestructible nature and to the manly self-assertion of the Romans — this idea is too firmly rooted, that it could ever have been extirpated; and the juristic instinct of the Romans was able to so mold it and give it the correct forms that it was itself compatible with the highest development of the state.

J. B. MOYLE: *IMPERATORIS IUSTINIANI INSTITUTIONES*, Vol. 1 (Second Edition, 1890), pages 632, 634-636.

'The Roman tribunals became the organs of the national sovereignty at an exceptionally early date, and the development of Roman law and procedure was exceptionally rapid;' consequently, we are enabled to bridge over the gulf between the primitive system of private vengeance, and the earliest Roman civil process of which we have any knowledge, less by tracing this gradual incorporation of self-redress with a regular procedure than by other indications of more advanced ideas. These in the main are three in number: the introduction and development of the idea of composition for injury; the plan of guaranteeing a man's rights by collective action through witnesses; and the contractual decision of disputes. * * *

iii. The contractual decision of disputes took two forms. The one consisted in the complainant's giving his adversary the option of denying his liability on

oath, or of being taken, in default, to admit it; it remained a permanent institution at Rome even to the time of Justinian, in whose Digest (12. 2. 38) we read '*manifestae turpitudinis et confessionis est nolle nec iurare nec iusiurandum referre.*' The other was reference of the matter by common consent to arbitration: from this, beyond the shadow of a doubt, the whole Roman system of actions tried before a judge or judges took its origin. The earliest judges derived their judicial authority, such as it was, not from the state, but from the voluntary submission of the parties: and Sir H. Maine has shown,¹ by an examination of the earliest Roman civil process, that the magistrate, even when commissioned by the state for the administration of justice, preserved the memory of the actual historical source of his functions by 'carefully simulating the demeanour of a private arbitrator casually called in.' The later Roman jurists, though struck by the similarity in procedure between an ordinary action and a reference to arbitration, were guilty of the curious anachronism of deriving the latter from the former: '*compromissum*' (one of them says) '*ad similitudinem iudiciorum redigitur;*' but the fact is that action grew out of arbitration, and the judge was originally only an unofficial referee: a fact of which traces are observable throughout the legal history of Rome. Thus, no action could validly be commenced, still less carried through to judgment, until the court had got both parties before it: for arbitration can take place only by consent, not by a unilateral act of either of them without the other. Still more forcibly are we reminded of the mode in which the early judge acquired his jurisdiction by the vitality of the rule that no judge could be forced upon a party of whose knowledge and integrity he was not satisfied: '*neminem,*' says Cicero,² '*voluerunt maiores nostri non modo de existimatione cuiusquam, sed ne pecuniaria quidem de re minima esse iudicem, nisi qui inter adversarios convenisset.*' Hence too the limited authority, as we should deem it, of the Roman iudex: he has no '*imperium*'; he cannot compel the parties to any act or forbearance; he is merely a referee whom they have chosen, and in whose appointment the magistrate has cooperated; all he has to do is to decide the questions submitted to him, so far as the parties may enable him; he has to leave to them the realization (by execution) of the right he ascertains. The very point he has actually to settle is at first kept studiously in the background, and hidden behind a wager; the decision is not an order or injunction, but an expression of opinion, *sententia*, *pronuntiatio*.

In England we know from actual records with what rapidity trial by jury in civil causes, though in most cases optional only, superseded the more barbarous methods of compurgation, ordeal, and trial by battle, and that this was largely due to a sense of the greater justice and reasonableness of the new system. We can hardly doubt that upon much the same grounds the practice of arbitration daily gained greater favour among the Romans. When political authority has at length obtained a firm footing, the magistrate is gradually preferred by litigants to a citizen arbitrator, perhaps from a conviction of his greater wisdom and impartiality: if he is a king, perhaps too because his divine descent is believed to confer upon him a sense of right, and a kind of knowledge, above his merely human fellows. Finally, the judicial function is recognised as appertaining to the state: though the primitive remedies may to some extent survive in all their rudeness, and though the state administration of justice may still more widely bear traces of the social condition which preceded political organization, still the natural mode of deciding a dispute is to go to the magistrate, and rules of civil procedure have begun to assume consistency. Courts have become established; their mode of action is prescribed by law; any attempt to evade their authority by recurring to other methods of obtaining satisfaction, save in certain well defined cases, is considered a defiance of law, and a breach of the peace.

This is the condition of the earliest judicial institutions at Rome of which we have any information. * * *

¹ Ancient Law pp. 375 seq.

² Pro Cluentio cap. 43.

J. N. MADVIG: DER RÖMISCHE STAAT. Vol. II, Leipzig, 1882, pages 216-218.

THE ADMINISTRATION OF PRIVATE LAW, JURISDICTION. ITS GENERAL FORM.

The procedure in private legal controversies, *causae privatae* (*iudicia privata*, court procedure and decisions in matters of private law),—which, like all Roman institutions, extended originally to the citizens in a single city with a restricted area, regarding whose development by custom, or possibly by realignment of its limits through organizing laws we know nothing, with the exception of some few matters of detail—rested on a unique co-operation between a magisterial personage and a number of citizens chosen to perform judicial duty. The magistrate directed all legal affairs, formulated and instituted each separate lawsuit; while he referred to one or to several of the men so chosen each case in definite form for their decision; afterward he gave their decision legal force and executed it. The distinction between Upper and Lower courts and the testing of the same case by several appeals were unknown in the Roman Republic. Every judicial transaction, even where documents were presented as evidence, was heard verbally and in public. Of the magistrate it was said: *ius dicit*, and his function was called: *iuris dictio* (in contradistinction with the *querere* and *questio* of criminal procedure, with which this magistrate had nothing to do); it was the function of the judge 'to find judgment' *iudicare*, and each civil lawsuit was divided into two parts: first the institution of the lawsuit before the magistrate, *in iure*, then final adjudication before the individual judge or judges, *in iudicio* (Cic. de inv. II, 19. Paul. Dig. I, 1, 11: *ubicunque prator . . . ius dicere constituit, is locus recte ius appellatur; in ius vocare, in ius ire*, etc.). Originally the king was at the head of the legal institutions, and after him the Consuls (but we know nothing regarding the division of the work between them), and in their absence the *praefectus urbi*, and after the year 366 the *Prator*; but, since there were several *prators*, the function devolved upon the city *prator* (an adjunct under the *prator inter peregrinos*; see Chap. V, § 8). Besides the jurisdiction personally directed by him in the city and its territory, and beside the judicial personnel directly under his authority, there arose—by virtue of the enlargement of the state through the subdivision of the population into municipalities (Prefectures and Colonies) and here and there into provinces—a municipal and provincial jurisdiction, from which, first in the time of the Roman emperors, when the municipal law became general, there was unfolded a uniform administration of justice for the whole empire. There was no need, nor was it to be expected, as already stated (Chap. V, § 2), that the *prator*, who was an administrative authority, sometimes even a general, should have had legal training; but, when composing his edicts, as well as in other special instances, he could avail himself of the assistance of the jurists.

THE JUDGES, IUDICES.

The judges were private citizens of whom a certain number were appointed for this service, regardless of juristic knowledge and training, but with reference to their position and personal integrity; so that the *prator* (*prator urbanus* and *prator inter peregrinos*) had to keep to the list (*album*) of these particular men. As long as the people themselves pronounced judgment in public legal matters, the men designated in the judicial list were intended only for the *iudicia privata* (perhaps excepting the *quaestiones extraordinariae* in consequence of a special law); but after the institution of permanent courts, *quaestiones perpetuae*, they were appointed for the adjudication of criminal matters, *iudicia publica*, which were formerly adjudicated by the people, and for each separate case there were appointed to these courts a certain number of the same men who pronounced judgment in private legal controversies, and who were designated in the law for the separate questions.

HENRY JOHN ROBY: ROMAN PRIVATE LAW IN THE TIMES OF CICERO AND OF THE ANTONINES. Vol. II (1902), pages 322-323.

Judices were according to Polybius (vi 17) taken in most of the important cases from the list of Senators, who however were disabled for this function¹ by C. Gracchus. He put *equites* in their place (*lex Sempronia* B. C. 122; Vell. ii 6; Cic. *Verr.* i 13 § 38).² In Cicero's speech *pro Rosc. Com.* 14 § 42 mention is made of a private suit in which an *eques* acted as *judez*, but the date of the suit is uncertain (see p. 502). In 81 B. C. Sulla as dictator restored the senate to their old position (cf. Cic. *Verr.* iii 41 § 96). In 70 B. C. L. Aurelius Cotta established a separate list from which *judices* were to be taken, composed of three *decuriae*, one of senators, one of *equites* and one of *tribuni aerarii* (Ascon. in *Corn.* p. 78 Bait., in *Pison.* p. 16; Cic. *Att.* i 16 § 4; etc.), who appear to have been a class of plebeians of position and property, ranking next to, or even sometimes with, the *equites* (Cic. *Cat.* iv 7 § 15; *Plac.* 2 § 4 with schol. Bob. *ad loc.* etc.³). It is supposed that equal numbers were taken from all three classes.⁴ The list (*album judicum*) was revised by the praetors, probably every year (Cic. *Clu.* 43 § 121).

ARTICLES OF CONFEDERATION ADOPTED BY THE STATES OF AMERICA ON JULY 9, 1778.

ARTICLE IX.

* * * * *

The United States, in Congress assembled, shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent of any State in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or being present, shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Con-

¹ See Madvig *Verfassung* ii pp. 218 sqq.; Mommsen *St. R.* iii 527 sqq.

² A consular Fimbria is spoken of as a *judez* in a case told to Cicero as a boy (Cic. *Off.* iii 19 § 77). Fimbria was consul in 104 B. C. but he may not have been a senator at the time of the trial, and he may have been privately appointed.

³ See Madvig *Verfassung* i 182 sqq.; Mommsen *St. R.* iii p. 192.

⁴ Cf. Sen. *Ben.* iii 7 § 7 *De quibusdam et imperitus judez demittere tabellam potest: . . . ubi vero id de quo sola sapientia decernit in controversiam incidit, non potest sumi ad hanc judez ex turba senatorum quem census in album et equestris hereditas misit.*

gress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive; the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned; provided, that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the supreme or superior court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward." Provided, also, that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions, as they may respect such lands and the State which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

REPORT OF THE COMMITTEE ON DETAIL, PRESENTED BY MR. RUTLEDGE TO THE
FEDERAL CONVENTION, August 6, 1787.*

ARTICLE IX.

Sect. 2. In all disputes and controversies now subsisting, or that may hereafter subsist between two or more States, respecting jurisdiction or territory, the Senate shall possess the following powers. Whenever the Legislature, or the Executive authority, or lawful Agent of any State, in controversy with another, shall by memorial to the Senate, state the matter in question, and apply for a hearing; notice of such memorial and application shall be given by order of the Senate, to the Legislature or the Executive authority of the other State in Controversy. The Senate shall also assign a day for the appearance of the parties, by their agents, before the House. The Agents shall be directed to appoint, by joint consent, commissioners or judges to constitute a Court for hearing and determining the matter in question. But if the Agents cannot agree, the Senate shall name three persons out of each of the several States; and from the list of such persons each party shall alternately strike out one, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as the Senate shall direct, shall in their presence, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them shall be commissioners or Judges to hear and finally determine the controversy; provided a majority of the Judges, who shall hear the cause, agree in the determination. If either party shall neglect to attend at the day assigned, without showing sufficient reasons for not attending, or being present shall refuse to strike, the Senate shall proceed to nominate three persons out of each State, and the Clerk of the Senate shall strike in behalf of the party absent or refusing. If any of the parties shall refuse to submit to the authority of such Court; or shall not appear to prosecute or

* See M. Farrand, *The Records of the Federal Convention of 1787*, Vol. II, pp. 182-185.

defend their claim or cause, the Court shall nevertheless proceed to pronounce judgment. The judgment shall be final and conclusive. The proceedings shall be transmitted to the President of the Senate, and shall be lodged among the public records, for the security of the parties concerned. Every Commissioner shall, before he sit in judgment, take an oath, to be administered by one of the Judges of the Supreme or Superior Court of the Senate where the cause shall be tried, "well and truly to hear and determine the matter in question according to the best of his judgment, without favor, affection, or hope of reward."

Sect. 3. All controversies concerning lands claimed under different grants of two or more States, whose jurisdictions, as they respect such lands shall have been decided or adjusted subsequent to such grants, or any of them, shall, on application to the Senate, be finally determined, as near as may be, in the same manner as is before prescribed for deciding controversies between different States.

PROCEEDINGS OF THE FEDERAL CONVENTION, AUGUST 24, 1787.*

Sect: 2 & 3 of art: IX being taken up.⁶

Mr. Rutledge said this provision (for deciding controversies between the States) was necessary under the Confederation, but will be rendered unnecessary by the National Judiciary now to be established, and moved to strike it out.

Doer. Johnson 2ded. the Motion.

Mr. Sherman concurred: so did Mr. Dayton.

Mr. Williamson was for postponing instead of striking out, in order to consider whether this might not be a good provision, in cases where the Judiciary were interested or too closely connected with the parties —

Mr. Ghorum had doubts as to striking out, The Judges might be connected with the States being parties — He was inclined to think the mode proposed in the clause would be more satisfactory than to refer such cases to the Judiciary —

On the Question for postponing (the 2d and 3d Section, it passed in the negative)

N. H. ay. Masts. no. (Cont. no) N. J. no. Penna. abst. Del. no. Md. no. Va. no. N. C. (ay) S-C no. Geo. ay. [Ayes — 3; noes — 7; absent — 1.]⁷

Mr. Wilson urged the striking out, the Judiciary being a better provision.

On Question for striking out 2 & 3 Sections Art: IX

N. H. ay. Mas: ay. Ct. ay. N. J — ay. Pa. abst. Del — ay. Md. ay. Va ay. N. C. no. S. C. ay — Geo. no. [Ayes — 8; noes — 2; absent — 1.]

CONSTITUTION OF THE UNITED STATES.

ARTICLE III.

SECTION 1.

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

* Op. Cit., Vol. II, pp. 400-401.

⁶ Relating to disputes between states and over land questions — modeled on procedure in Articles of Confederation.

⁷ Vote of Connecticut inserted, and that of North Carolina changed to conform to Journal.

SECTION 2.

§ 1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES, ADOPTED AT THE HAGUE CONFERENCE OF 1889.

ARTICLE 20.

With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Signatory Powers undertake to organize a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the Rules of Procedure inserted in the present Convention.

ARTICLE 23.

Within the three months following its ratification of the present Act, each Signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrators.

The persons thus selected shall be inscribed, as Members of the Court, in a list which shall be notified by the Bureau to all the Signatory Powers.

Any alteration in the list of Arbitrators is brought by the Bureau to the knowledge of the Signatory Powers.

Two or more Powers may agree on the selection in common of one or more Members.

The same person can be selected by different Powers.

The Members of the Court are appointed for a term of six years. Their appointments can be renewed.

In case of the death or retirement of a Member of the Court, his place shall be filled in accordance with the method of his appointment.

ARTICLE 24.

When the Signatory Powers desire to have recourse to the Permanent Court for the settlement of a difference that has arisen between them, the Arbitrators called upon to form the competent Tribunal to decide this difference must be chosen from the general list of Members of the Court.

Failing the direct agreement of the parties on the composition of the Arbitration Tribunal, the following course shall be pursued:

Each party appoints two Arbitrators, and these together choose an Umpire.

If the votes are equal, the choice of the Umpire, is intrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject, each party selects a different Power, and the choice of the Umpire is made in concert by the Powers thus selected.

The Tribunal being thus composed, the parties notify to the Bureau their determination to have recourse to the Court and the names of the Arbitrators.

The Tribunal of Arbitration assembles on the date fixed by the parties.

The Members of the Court, in the discharge of their duties and out of their own country, enjoy diplomatic privileges and immunities.

THE FRENCH SPOILIATION CLAIMS

From time to time the cases known by the generic name of **French Spoliation Claims** come up for discussion in Congress and in the press and are often debated without any very definite conception of their origin or basis. It may seem strange that claims against the government whose inception is connected with the very beginning of our national existence should still be the subject of consideration as present demands against the government, both before the courts and in the legislative forum.

But dilatoriness in dealing with matters of private right between the citizen and the government seems to have become traditional. Not until 1885 was there any tribunal before which these claims could be prosecuted. Even under the Act of 1885, as will be seen hereafter, a decision of the court has not the legal effect of a final judgment. Hence, it is that the liability of the government for the payment of these claims settled by unanimous judicial decision a quarter of a century ago is often reopened in Congress and the press and the subject threshed out anew, often in apparent ignorance of the laborious investigation long since made by the Court of Claims into the history and basis of these claims, and the result of that investigation as announced in a number of thorough and well-reasoned opinions.

The origin of these claims is closely intertwined with the stirring events of our struggle for independent national existence. At its darkest hour the astute diplomacy of Franklin and his colleagues convinced the generous and high-minded young King Louis XVI and his counsellors that it would be to the interest of France to enter into an alliance with us. Vergennes and the other ministers of the King clearly saw that we had a great future before us and decided that our friendship was of importance. This view led to our recognition as a government by France, first among all nations, and to the conclusion of two treaties with that country made together and constituting in

diplomatic effect one instrument, the first by many years of all the treaties entered into by the United States.

By the 11th article of the "Treaty of Alliance between the United States of North America and His Most Christian Majesty, Concluded at Paris February 6, 1778, Ratified by Congress May 4, 1778," the following momentous guaranty was given by each party to the other:¹

Article XI. The two parties guarantee mutually from the present time and forever against all other powers, to wit:

The United States to His Most Christian Majesty, the present possessions of the Crown of France in America, as well as those which it may acquire by the future treaty of peace;

And His Most Christian Majesty guarantees on his part to the United States their liberty, sovereignty, and independence, absolute and unlimited, as well in matters of government as commerce, and also their possessions, and the additions or conquests that their confederation may obtain during the war, from any of the dominions now, or heretofore possessed by Great Britain in North America, conformable to the 5th and 6th articles above written, the whole as their possessions shall be fixed and assured to the said States, at the moment of the cessation of their present war with England.

The guaranty thus given by France to us was essential to our national existence. We were in the midst of a contest for independence — a contest the issue of which was then very doubtful. The act of France in recognizing the separate national existence of revolted British colonies constituted in effect a declaration of war against Great Britain, and as such was fully acted upon by both nations.

The guaranty of our independence here made by France was carried out in the fullest manner. She supplied us with troops and munitions of war most fully and generously and made us large loans in money. Her aid was important, if not indispensable, to our success in gaining our independence.

Our next treaty with her, made in 1782, when the struggle had been practically decided in our favor, is entitled "Contract between His Most Christian Majesty, and the Thirteen United States of North America, relative to payment of loan," etc. It begins:²

¹ Public Treaties of the United States, 1875, pp. 202, 203.

² Public Treaties of the United States, 1875, p. 214.

The King having been pleased to attend to the requests made to him in the name and on behalf of the United Provinces of North America, for assistance in the war and invasion under which they had for several years groaned; and His Majesty, after entering into a treaty of amity and commerce with the said Confederated Provinces, on the 6th of February, 1778, having had the goodness to support them, not only with his forces by land and sea, but also with advances of money, as abundant as they were effectual, in the critical situation to which their affairs were reduced: it has been judged proper and necessary to state exactly the amount of those advances, etc.

The treaty then proceeds to show that these loans amounted to eighteen million livres, money of France, which by that treaty the United States agreed to repay in stipulated installments with interest at five per cent. from the date of the treaty of peace, not yet then concluded. The King as ³ —

a new proof of his affection and friendship, has been pleased to make a present of, and to forgive the whole arrears of interest to this day, and from thence to the date of the treaty of peace; a favor which the Minister of the Congress of the United States acknowledges to flow from the pure bounty of the King, and which he accepts in the name of the said United States with profound and lively acknowledgments.

The guaranty which we, on the other hand, gave to France was of no less importance. Her present possessions, which we guaranteed to her forever, were very extensive and valuable — the islands of Santo Domingo, Martinique, Guadeloupe, St. Lucia, St. Vincent, Tobago, Deseada, Marie-Galante, and Granada in the West Indies, a colony on the mainland at Cayenne, and the islands of St. Pierre and Miquelon on the coast of Newfoundland.

This treaty also authorized all ships of war and privateers of either party to carry their prizes freely into the ports of the other without any examination concerning the lawfulness of the prize. The privilege was furthermore made exclusive. "No shelter or refuge shall be given in their ports to such as shall have made prize of the subjects, people or property of either of the parties." ⁴

Our national independence was secured with the aid of France

³ Public Treaties of the United States, 1875, p. 215.

⁴ Public Treaties of the United States, 1875, article 17, pp. 208, 209.

and was in 1783 finally acknowledged in the fullest manner by our former sovereign, King George III. If France had expected any special commercial relations to spring up as a consequence of her alliance with us, the expectation seems to have been disappointed. Trade and commerce tended to revert to their old channels.

In 1789 the French Revolution broke out. The monarchy came to an end and King Louis XVI, our good friend of fifteen years earlier, was executed in 1793. War broke out between France and Great Britain with whom were allied nearly all the other nations of Europe.

It then became of vital importance for France that we should take sides with her and make good the perpetual guaranty which we had given her of her American possessions, as well as allow her the exclusive privileges in relation to her prizes secured to her by the treaty of 1778. There was no national sentiment in favor of doing any of these things. On the contrary, we entered into the most friendly relations with our former enemy, Great Britain.

John Jay was sent as envoy to that country with instructions to conclude a treaty. We had our own grievances against that country, as will be seen later. Jay was instructed not to let these grievances stand in the way of the conclusion of a treaty. The result was the British treaty of 1794. It was therein provided in direct contravention of our agreement of 1778 with France:

It shall be lawful for the ships of war and privateers belonging to the said parties respectively to carry whithersoever they please the ships and goods taken from their enemies, without being obliged to pay any fee to the officers of the admiralty, or to any judges whatever; nor shall the said prizes, when they arrive at and enter the ports of the said parties, be detained or seized, neither shall the searchers or other officers of those places visit such prizes (except for the purpose of preventing the carrying of any part of the cargo thereof on shore in any manner contrary to the established laws of revenue, navigation, or commerce), nor shall such officers take cognizance of the validity of such prizes; but they shall be at liberty to hoist sail and depart as speedily as may be, and carry their said prizes to the place mentioned in their commissions or patents, which the commanders of the said ships of war or privateers shall be obliged to show.⁵

⁵ Public Treaties of the United States, 1875, article XXV, p. 280.

This privilege was again made exclusive by the provision, "No shelter or refuge shall be given in their ports to such as have made a prize upon the subjects or citizens of either of the said parties."

So direct was the conflict between this provision and the equally exclusive one of the French treaty of sixteen years earlier that it seems a touch of sarcasm when it is added later down in the same article:

Nothing in this treaty contained shall, however, be construed or operate contrary to former and existing public treaties with other sovereigns or States.

The ties of mutual self-interest between ourselves and Great Britain reasserted themselves as soon as the political difficulties between us were disposed of by our separation from that country. It is not necessary to criticise the international morality of our statesmen of that day when we confess that France had a well-founded grievance against us. When we refused to abide by our guaranty to France of the continued possession of her American colonies, when we took away from her the exclusive port privileges secured to her by treaty, and when we made the Jay treaty of 1794 with Great Britain, we committed a flagrant breach of our plighted faith for which she might well call upon us to make reparation.

Great Britain, being the almost undisputed mistress of the seas, took from France in little more than a month all of her possessions in the West Indies, without our lifting a finger to defend them as we were required to do by the treaty of 1778 "from the present time and forever against all other Powers."

The contest between France and Great Britain reached such a degree of bitterness that neutral rights were trampled under foot by both parties. Each aimed to deprive the other of all benefit of neutral trade. Captures were not limited to enemies' property, to contraband of war or to vessels destined to blockaded ports. Each virtually prohibited all trade with the opposite belligerent. Vessels and other cargoes in peaceful pursuit of lawful trade on the high seas were captured by both without any regard to international law.

The action of France was further stimulated by her national and well-founded grievance against us, in that we had failed to maintain

our perpetual and solemn guaranty of her peaceable possession of her American colonies and had transferred her exclusive port privileges to her enemy. It was claimed, and probably with some truth, that the first seizures of American merchantmen and their cargoes on the high seas were made in mistake of nationality. Identity of language and similarity of appearance caused the French to mistake Americans for English, as they constantly do even at the present day when the differences between the two nations have become much more marked.

Generally these vessels and their cargoes were taken into ports of France or her colonies and were there condemned by tribunals exercising jurisdiction in prize. Sometimes they were merely seized and converted by the captors to their own use without any legal form of condemnation. Occasionally the cargo was removed from a vessel, the crew taken on board the capturing vessel and the captured vessel burned. In such cases the crew were set adrift at the convenience of the captors. Of course the captors in such cases did not take the trouble to secure any legal condemnation of either vessel or cargo. Sometimes the master and crew were kept in prison while their vessel was condemned, with no opportunity on their part to appear or make any showing in opposition to the proceedings of the captors. In any case, whether the proceedings took place in France or her colonies, they were in a strange land where the captured master and crew were ignorant of the language and laws, without money or friends and at the mercy of tribunals committed in advance to an adverse decision.

Many of these seizures were made by French public vessels of war, but a very large proportion by privateers commissioned by authority of the French Government. France had at that time a very small navy, and therefore commissioned a large number of privateers. Some of the grounds of condemnation were ludicrous. In one case one ground of condemnation was that the American flag carried by the prize vessel contained only fourteen stars instead of fifteen. In another case there was the ground, equally without force in law, but of more importance in the eyes of the French, that the vessel carried three English passengers. In most cases the ground of condemnation consisted in some trifling irregularity in the ship's papers, usually in

her *rôle d'équipage*, or, as it is sometimes termed not with entire accuracy, her crew list.

In the West Indies, and particularly in Guadeloupe, after the recapture of that island from the British, the judges of the prize tribunals not only acted with flagrant disregard of law and justice, but were stimulated to do so by motives of personal interest in the proceedings. The judges were themselves frequently part owners of the very privateers upon the legality of whose captures they pronounced, and participated in the fruits of their own decrees.

The spoliations committed upon our commerce by the other belligerents of the day in the prosecution of their arbitrary measures in disregard of neutral rights were long since settled and paid. Those against Great Britain were settled through a provision in the Jay treaty of 1794 constituting a joint claims commission. Under the action of this commission Great Britain paid in satisfaction of the claims of our citizens many millions of dollars. The spoliations thus committed by England were for the purpose of starving the French by depriving them of supplies being transported in our vessels to French ports, just as the spoliations committed by the French, forming the subject of the claims now under discussion, were largely for the counter purpose of feeding the French people.

Spain acted as an ally of France and many of the French prizes were condemned by French authorities exercising jurisdiction in prize within Spanish territory. Spain, by the treaty of 1819 ceding Florida, was in consideration of that cession released from the payment of all claims of this character for which she was responsible, and the United States agreed to make satisfaction for the claims of our own citizens against Spain. This obligation was fulfilled by our government; all claims against Spain were satisfied through the agency of a claims commission appointed under the authority of an Act of Congress; and its awards were promptly met and paid by appropriations from our treasury.

Thus of the three Powers which committed spoliations on our commerce during this period — Great Britain, France and Spain — France is the only one for whose spoliations no reparation has ever been made.

Against France our government at the time took measures as vigorous as the then feeble condition of our newly-formed nation permitted, and as prompt as was consistent with the slowness of communication existing between this country and the other side of the ocean.

One set of envoys after another was sent to France and, after being successively treated in a manner to humiliate both themselves and the nation which they represented, successively failed to secure any cessation of the injuries or promise of redress.

Congress in 1798 passed a number of measures of a defensive character in preparation for the breach, then regarded as imminent, of peaceful relations with France.

On May 28, 1798, was passed "An act more effectually to protect the Commerce and Coasts of the United States,"⁶ giving authority to the President to instruct commanders of the armed vessels of the United States to seize any armed vessel hovering about the coast of the United States for the purpose of committing depredations on American vessels, and also to retake any merchantmen which may have been captured by any such armed vessel.

On the 13th of June, 1798,⁷ commercial intercourse was suspended between the United States and France, but it was directed that if before the next session of Congress the French Government should disavow its depredations upon the vessels and other property of American citizens and thereby acknowledge the claim of the United States to be considered neutral in the existing European disputes, the President might remit and discontinue the prohibitions and restraints thereby declared.

June 25, 1798,⁸ merchant vessels were authorized to defend themselves against search, restraint, or seizure, on the part of any armed vessel sailing under French colors, and to retake any vessel captured by any vessel acting under authority from the French Republic. But there was a proviso couched in the studiously restrained language of the entire series of legislation, directing that whenever the Govern-

⁶ 1 Statutes at Large, 561.

⁷ 1 Statutes at Large, 565.

⁸ 1 Statutes at Large, 572.

ment of France should disavow and cease its lawless depredations, the President should thereafter instruct the commanders and crews of American merchantmen to submit to any regular search on their part.

On the 7th of July, 1798,⁹ the treaties between the United States and France were declared to have been so repeatedly violated on the part of the French Government and that government was declared to be pursuing a system of such predatory violence against the United States that our government was exonerated from the stipulations of those treaties and they should not thenceforth be regarded as legally obligatory on the government or the citizens of the United States.

On the 9th of July, 1798,¹⁰ the public armed vessels of the United States were, if instructed by the President, to have authority to seize any armed French vessel, and the President was also authorized to grant special commissions to the owners of private armed vessels for subduing, seizing and capturing any armed French vessel, and for the recapture of American property captured by such French vessels, though here again the legislation is hedged around with restrictions showing a high degree of self-restraint on the part of the legislators of the period in view of the severe provocation to which we were subjected.

The legislation of the time is also full of provisions for strengthening our naval armament in preparation for the expected outbreak or complete breach with France. Indeed, the very existence of the Navy Department as a separate executive department dates from this eventful period.¹¹

Washington was, in anticipation of more vigorous steps being required, commissioned in his retirement at Mount Vernon as Lieutenant-General,¹² and held his commission under that act to the date of his death the following year, though events never came to a point requiring him actively to assume the command legally conferred upon him.

⁹ 1 Statutes at Large, 578.

¹⁰ 1 Statutes at Large, 578.

¹¹ April 30, 1798, 1 Statutes at Large, 553.

¹² Act May 28, 1798, sec. 5, 1 Statutes at Large, 558.

We were thus brought to the very brink of war with France and, indeed, to a qualified state of hostility. At no time, however, did the French prize tribunals, anxious as they were to seize upon every excuse for the condemnation of American property, base their acts in doing so upon the ground of the existence of war between France and the United States, a ground which, had it existed, would have been a conclusive justification for their action, and which would, indeed, have made it unnecessary to assign any other. And in all the negotiations with France in which these claims were pressed, she never set up as a defense the existence of a state of war.

From a complete break with France we were saved by the statesmanship of the negotiators of the treaty of September 30, 1800. These men, sent out by President John Adams, were headed by Oliver Ellsworth, Chief Justice of the United States. When they arrived in France, they found the Directory no longer in power, but the government practically in the hands of Napoleon under the title of First Consul.

After many months of negotiation, in which the French negotiators urged the continued force and obligation of our guaranty of the American possessions of France, a treaty was finally concluded. The difficulties in the negotiation of this treaty which from time to time threatened to break off the negotiations, were the insistence on the one hand by France upon our making good our perpetual guaranty of France in her American possessions, and on the other hand the equal urgency of our own envoys in behalf of the claims of American merchantmen for indemnity from the Government of France for the seizure of their vessels and cargoes.

The validity of these mutual claims was fully admitted on both sides. Our envoys offered a large sum in cash to get rid of our national obligations to France, but insisted upon a claims commission to determine the claims of our citizens against France for the spoliations. France admitted the unjustifiableness of the seizures made by her men-of-war and privateers, and was perfectly ready to make full reparation if we had agreed to make good our treaty obligations for the guaranty of her American possessions and for the exclusive port privileges.

The result of the negotiations was in effect a surrender — in the end, an absolute and express surrender — of these mutual claims on both sides. Article 2, as it appeared in this treaty of 1800 when signed by the respective plenipotentiaries of the two nations, read as follows: ¹³

The Ministers Plenipotentiary of the two parties not being able to agree at present respecting the treaty of alliance of 6th February, 1778, the treaty of amity and commerce of the same date, and the convention of 14th of November, 1788, nor upon the indemnities mutually due or claimed, the parties will negotiate further on these subjects at a convenient time, and until they may have agreed upon these points the said treaties and convention shall have no operation, and the relations of the two countries shall be regulated as follows:

Had this article been agreed to by the two nations as thus signed by the plenipotentiaries, it would have still left open both the national claims of France against us and the individual claims of our ship owners and merchants against France. But at the end of this treaty as officially published ¹⁴ the sequel appears as follows:

The Senate of the United States did, by their resolution on the 3d day of February, 1801, consent to and advise the ratification of the convention: *Provided*, The second article be expunged, and that the following article be added or inserted: "It is agreed that the present convention shall be in force for the term of eight years from the time of the exchange of the ratifications."

Bonaparte, First Consul, in the name of the French people, consented on the 31st July, 1801, "to accept, ratify, and confirm the above convention, with the addition importing that the convention shall be in force for the space of eight years, and with the retrenchment of the second article: *Provided*, That by this retrenchment the two States renounce the respective pretensions, which are the object of the said article."

These ratifications, having been exchanged at Paris on the 31st of July, 1801, were again submitted to the Senate of the United States, which, on the 19th of December, 1801, declared that it considered the convention fully ratified, and returned it to the President for promulgation.

Thus, the two countries renounced as against each other their respective claims. The claim of France against us was a national one.

¹³ Public Treaties of the United States, 1875, p. 225.

¹⁴ Public Treaties of the United States, 1875, p. 232.

It consisted in the obligation assumed by us and the execution of which was insisted upon by France to guarantee her forever in the possession of her American colonies — an obligation assumed by us in return for her aid at the time of our utmost national peril. This guaranty we had already violated.

So, too, with the exclusive port privileges which we had guaranteed to France in time of war, and which we had by the Jay treaty of 1794 transferred to Great Britain, France had a national claim against us based upon this violation, although to have re-established the provisions of the French treaty of 1778 in this respect would have involved us in difficulties with Great Britain. Whether these violations of our treaty obligations were, in the forum of international morals, justifiable, is a question to which various answers might be given, and which the Court of Claims did not find itself obliged to answer. As a question of international law, however, there can be no doubt. The treaty obligations were there. We had utterly disregarded them, and for that disregard France had as good a claim against us as we had against her for her many unjustifiable captures of our merchantmen. To have kept good our obligations with France would have involved us in a second war with Great Britain, for which we were not ready, and in which the people of the United States would have felt no national interest under the friendly relations which we had then resumed with the English. To take up again the cause of France and to reassume our guaranty of her American colonies and our promise of exclusive port privileges to her in time of war would have meant in 1800 to tie ourselves up at the dawn of the nineteenth century with the struggles and quarrels of Europe, from which it was our greatest blessing to have cut loose when we declared ourselves independent.

A high order of statesmanship was shown by President John Adams, his cabinet and his negotiators of this treaty when they thereby obtained the release of our government from this onerous and inconvenient obligation.

The American claims against France were of a totally different character. They were presented, it is true, by the nation, as all individual claims against a foreign government must be presented

by the nation and not by the individual himself. But ultimately they were claims of the individual owners of vessels and cargoes captured and condemned with or without legal process by the French. They were based upon the long series of spoliations committed by the public cruisers and private-armed vessels under commissions from the French Government against our merchantmen, vessels peaceably pursuing their course of lawful trade between 1793 and 1800. Thus, the rights of American ship owners and merchants were traded away in return for a great national advantage.

They thereafter had no redress against France and naturally looked to their own government for indemnity for their losses from which indemnity France had been forever released. From that time for a period of eighty-five years those claims were actively pressed, first by the original claimants, and afterwards by their descendants. They were championed by some of the greatest names in American public life.

Chief Justice Marshall especially expressed himself as impressed with their equity and justice. He said that:

Having been connected with the events of the period and conversant with the circumstances under which the claims arose, he was, from his own knowledge, satisfied that there was the strongest obligation on the Government to compensate the sufferers by the French spoliations.¹⁵

In 1826, Henry Clay, then Secretary of State, transmitted to the Senate in pursuance of a resolution, all the diplomatic correspondence which had given rise to these claims, and it was printed as Senate Document No. 102, 19th Cong. 1st Sess.

It is significant that from that time until 1885, when the act was passed referring these claims to the Court of Claims, no adverse report was ever made on these claims in either House of Congress. The act which thus became a law in 1885 was the third to pass both Houses of Congress. The first was vetoed by President Polk on account of the condition of the Treasury, which he deemed "not justifying the expenditure of the money at that time," and the second by President Pierce on grounds going to the origin of the claims.

¹⁵ Clayton's Speech, 1846.

The third, which was signed by President Arthur, gave the Court of Claims power and jurisdiction to examine into the validity of the claims, their present ownership, and all considerations affecting their validity, merits, and the amounts, and to report to Congress its conclusions of fact and law with regard to each claim.¹⁶

The Court of Claims is a tribunal originally established by Act of February 24, 1855,¹⁷ "for the investigation of claims against the United States." Story, in his work on the Constitution, Sec. 1678, intimates a strong opinion that it is the duty of Congress to establish a tribunal in which the government may be sued. This duty was neglected until long after Story's death. Even after the court was established, it was prohibited from exercising jurisdiction over any claims "growing out of or dependent on any treaty stipulation entered into with foreign nations."¹⁸

Long after the establishment of the court, Chief Justice Chase, for the Supreme Court, said:

It was urged in argument that the right to sue the government in the Court of Claims is a matter of favor; but this seems not entirely accurate. It is as much the duty of the government as of individuals to fulfil its obligations.¹⁹

And still later:

By establishing this court, the United States created a tribunal to determine the right to receive moneys due by the government.²⁰

The general provisions of law relating to the Court of Claims are now embodied in Chapter 7 of the Judicial Code of March 3, 1911.

The general jurisdiction of the court is mainly exercised in cases arising out of contracts with the government and in suits involving the question of pay or emoluments of officers.

Under the ordinary procedure of that court, it enters final judgments against the United States from which appeals lie to the Su-

¹⁶ 23 Statutes at Large, 283.

¹⁷ 10 Statutes at Large, 612.

¹⁸ 12 Statutes at Large, 767.

¹⁹ *United States v. Klein*, 13 Wall. 128, 144.

²⁰ *United States v. Borchertling*, 185 U. S. 223, 234.

preme Court of the United States.²¹ But "the judgment of the Court of Claims, from which no appeal is taken, is just as conclusive under existing laws as the judgment of the Supreme Court, until it is set aside on a motion for new trial."²²

In these French spoliation claims, however, provision was made by the Act of 1885 that the decision of the court should not take the form of a judgment, but that its conclusions of fact and law should be reported to Congress as advisory for future action.

In the first cases which came before the Court of Claims under this act it was maintained on behalf of the claimants that the terms of the act constituted a pre-judgment on the part of Congress of the validity of the claims as a class, leaving only to the court the examination of the particular facts and circumstances tending to bring each claim within the class. This view the court refused to adopt and held on the contrary that it was the intention of Congress to submit to the court the original and underlying question involving the validity of all the claims as a class.

It therefore entered into an exhaustive examination of all the facts of diplomatic history with regard to the relations of France and the United States at that day. The opinions in the initial cases were written by Judge John Davis, then fresh from a service of great brilliancy as Assistant Secretary of State, and constitute beyond all doubt the most complete examination which the general subject of these claims has ever received.

The principal defense of the United States was that France and the United States were at war during the time of these captures and that therefore the captures were justifiable as having been made by a belligerent against the private property of another belligerent found on the high seas. The court made an examination of the entire statutory history of the period, as well as of the judicial and diplomatic acts of each government bearing on the question.

The conclusion reached was that while the relations had become very strained and there was even a partial state of hostilities, there had not been a state of war between France and the United States at

²¹ Judicial Code, Secs. 242, 243.

²² *United States v. O'Grady*, 22 Wall. 641, 648.

any time. The legislation of the day, as has been shown by the brief summary given of it earlier in this article, was marked by studious restraint, and nowhere authorized anything going beyond defensive measures against the arbitrary and unlawful depredations of French cruisers and privateers upon American commerce.

The French tribunals, on the other hand, with all their desire to find every pretext for the condemnation of American vessels and cargoes, had never claimed that they had justification for so doing in the existence of a state of war between the two countries. And when the claims were presented and actively urged by our negotiators upon the French Government as proper subjects for treaty settlement, their validity was never questioned, but they were met by the assertion of equally valid national claims existing on the part of France against the United States.

The position of the two governments is also clearly stated in Senator Sumner's great report on these claims:

And now, when it is considered that Congress alone, under the Constitution, has the power to declare war; that it never made any declaration of war against France, and that throughout this whole period of trouble — in its whole series of acts — it expressly negatived the fact of war, it is impossible to assert that, according to the understanding of our Government, war actually existed. What Congress did, and what it failed to do, testify alike.

But the declarations of the Executive are as explicit as the declarations of Congress. In the instructions to our plenipotentiaries at Paris, under date of October 22, 1799, the Secretary of State, after reciting the spoliations of France, says:

"This conduct of the French Republic would well have justified an immediate declaration of war on the part of the United States; but desirous of maintaining peace, and still willing to leave open the door of reconciliation with France, the United States contented themselves with preparations for defense and measures calculated to protect their commerce. (French Spoliations, 1826, p. 561.)"

And these plenipotentiaries declared to the French plenipotentiaries, under date of April 16, 1800, that "the act of Congress, far from contemplating a co-operation with the enemies of the Republic, did not even authorize reprisals upon merchantmen, but were restricted solely to giving safety to our own, till a moment should arrive when their sufferings could be heard and redressed." (*Ibid.*, p. 583.) Again, in the instructions to our Minister in England, under date of September 20, 1800, the Secretary of State, who was none other than John Marshall, says:

"The aggressions of one and sometimes of another belligerent power have forced us to contemplate and to prepare for war as a probable event. (*Ibid.*, p. 452.)"

In the face of such declarations who can say that war existed? ²³

And again:

Already, at an earlier day, Talleyrand, as minister of foreign relations, had written, under date of August 28, 1798:

"France has a double motive, as a Nation and as a Republic, not to expose to any hazard the present existence of the United States. Therefore it never thought of making war against them; and every contrary supposition is an insult to common sense." (*Ibid.*, p. 649.)

When the convention in its final form was laid before the legislative assembly of France, one of the French plenipotentiaries charged with its vindication announced in a speech, November 26, 1801, that "it had terminated the misunderstanding between France and America," which, he said, had become such "that the reconciliation should be hastened if it was desired that it should not become very difficult." A report was also made to the legislative assembly by M. Adet, formerly French minister to the United States, in which it is declared:

"There had not been any declaration of war. Commissions granted by the President to attack the armed vessels of France are not to be regarded as a declaration of war. The will of the President does not suffice to put America in a state of war. It requires a positive declaration of Congress to this effect. None has ever existed." (Code Diplomatique, par Portiez, tom. 1, pp. 39-57.)

And these legislative documents, so positive in character, are introduced by the learned editor in words which fitly characterize the international relations to which they refer when he says that "they exhibit the causes which ruffled the harmony of the two States." True enough. The harmony of the two States was ruffled, but war did not exist.²⁴

And many years after the first decisions of the Court of Claims, that master of the general subject of governmental liability, Chief Justice Nott, said in regard to the subject of the existence of war:

* * * that no war existed which released France from her international responsibilities, or which authorized her to destroy American commerce. The question has been exhaustively argued and exhaustively examined, and all the information and learning which it is susceptible

²³ Compilation of Reports of Committee on Foreign Relations, U. S. Senate, Vol. I, pp. 305, 306.

²⁴ Compilation of Reports of Committee on Foreign Relations, U. S. Senate, Vol. I, p. 306.

of receiving will be found embodied in the opinions in the cases of *Gray* (21 C. Cls. R. 340), *Cushing* (22 id. 1), and the *John* (22 id. 408). In a few words it may be said that the United States never ceased to hold France pecuniarily responsible for the acts of her cruisers and privateers, and that France never denied her liability for unjustifiable seizures and condemnations. Moreover, France never interposed the defense of belligerent rights, but, on the contrary, again and again reiterated her willingness to discharge her treaty and international obligations whenever the United States would discharge theirs. A defense which France could not now and did not then set up, the United States cannot set up. Where France claimed no exemption the United States can claim none for her; where they can claim no exemption for France, they can set up none for themselves. The question of liability to be determined is the liability of France.²⁵

There was thus a complete chain of evidence that neither France nor the United States regarded herself as at war with the other during this period, and that both nations regarded the claims of American citizens against France for the spoliation of their property as well founded. Thus, the claims having been traded off by the American negotiators of the treaty in return for our release from national claims of the most embarrassing character on the part of France against us, the court held that the case was covered by the general principle of international law, that when a claim of a citizen against a foreign government is surrendered or relinquished by that government for its own advantage, it is bound to compensate him for the sacrifice thus exacted of him for the national advantage.

Lord Truro's view, expressed in the House of Lords, was cited:

That if the subject of a country is spoliated by a foreign Government he is entitled to redress through the means of his own Government. But if from weakness, timidity, or any other cause on the part of his own Government no redress is obtained from the foreign one, then he has a claim against his own country.²⁶

It was added:

The same position is sustained by that eminent writer upon the public law, Vattel, who held that while the sovereign may dispose of either the person or the property of a subject by treaty with a foreign power, still,

²⁵ *Ship Concord*, 35 C. Cls. 432, 443, 444.

²⁶ *De Bode v. The Queen*, 3 Clarke's House of Lords, p. 464.

"as it is for the public advantage that he thus disposes of them, the State is bound to indemnify the citizens who are sufferers by the transaction." (Book 4, chap. 2.)

Napoleon, from his retirement in St. Helena, testified that by the suppression of the second article of the treaty of 1800 the privileges which France had possessed by the treaty of 1778 were ended, and the "just claims which America might have made for injuries done in time of peace" were annulled, adding that this was exactly what he had proposed to himself in fixing these two points "as equi-ponderating each other." (Gourgaud, *Memoirs*, vol. 2, p. 129.)

Finally, Senator Livingston, familiar with the whole subject as a contemporary, in his report upon it to the Senate, said:

"The committee think it sufficiently shown that the claim for indemnities was surrendered as an equivalent for the discharge of the United States from its heavy national obligations, and for the damages that were due for their preceding nonperformance of them. If so, can there be a doubt, independent of the constitutional provision, that the sufferers are entitled to indemnity? Under that provision, is not this right converted into one that we are under the most solemn obligations to satisfy? To lessen the public expenditure is a great legislative duty; to lessen it at the expense of justice, public faith, and constitutional right would be a crime. Conceiving that all these require that relief should be granted to the petitioners, they beg leave to bring in a bill for that purpose."²⁷

The same principle is expressed in the Fifth Amendment to the Constitution, "Nor shall private property be taken for public use without just compensation."

These opinions of the Court of Claims were made the subject of a review by Sir John Westlake in the *Revue de Droit International*, Brussels, Vol. 18, p. 543. This very competent critic, looking at the question from an impartial distance, treats the decision of the Court of Claims as being so clearly right as hardly to admit of question. He says:

The pamphlet before us contains the advice given by the Court of Claims, and it is hardly necessary to say that this advice is favorable to the claimants.²⁸

²⁷ *Gray, Adm'r v. United States*, 21 C. Cls. 340, 391.

²⁸ "La brochure dont nous nous occupons renferme les avis donnés par la cour des griefs, et il est presque inutile de dire que ces avis sont favorables aux plaignants."

And he concludes:

Let us hope that Congress will conform to the advice which has been given to it, and will thus bring to an end a controversy, interesting rather on account of its origin and its extraordinary duration than by reason of any difficulties which it presents.²⁹

The general question of the liability of the United States for these French spoliations has just been re-examined by the Court of Claims, the entire membership of the court having changed since the initial decisions of 1886.

The court in 1911, by Judge Howry, thus recapitulated and re-affirmed its conclusion of twenty-five years earlier:

Beginning with the reports of Mr. Pickering (who was Secretary of State under the administrations of both President Washington and President Adams) and ending with the approval of the act of 1885 by President Arthur, the discussions related to indemnity for property spoliated and not to diplomatic claims for injuries done to persons sailing the seas. Chief Justice Marshall, while contending that there was the strongest obligation on our Government to compensate, restricted the contention to compensation for those whose vessels and cargoes had been despoiled. Clayton's speech, 1846. Mr. Clay rested his contention for payment upon the rule of equity "furnished by our Constitution," which provides that private property shall not be taken for public use without just compensation — making his contention so applicable as to entitle the injured citizen to consider his own country a substitute for the foreign power. The Meade case in 1821. Mr. Clay's report was either preceded or followed by forty-four other reports generally favorable for indemnity for property only. Many eminent in our public life concurred, including President Madison, Edward Livingston, Clinton, Everett, Webster, Cushing, Choate, Sumner. This court has said, however, that opponents were not wanting, among the most eminent of whom was Forsyth, Calhoun, Silas Wright, Benton, President Polk, and President Pierce. In the three unfavorable reports the objectors put their opposition to indemnities of any kind.

The act for the payment of these claims discloses a majority of many more than two to one of those voting in the House of Representatives. Those supporting the measure include names from all sections of the country. Among many eminent in their day and time but no longer living may be mentioned Culberson, Breckinridge, Broadhead, Dingley,

²⁹ "Espérons que le congrès se ralliera à l'avis qui lui est donné, et terminera ainsi une controverse qui offre de l'intérêt plus à cause de son origine et de sa durée extraordinaire qu'à cause des difficultés qu'elle présente."

Abram S. Hewitt, Oates, Thos. B. Reed, W. L. Wilson, and John Randolph Tucker. The measure passed the Senate without a record vote. 16 Cong. Rec., 48th Cong.

A cash valuation had been put upon the claims of our merchantmen and vessel owners of a large sum. But later, France admitted a valuation of property spoliated of ten millions of francs. At the same time France was contending that by reason of the abrogation of our treaty with that Government, France had sustained damages for a sum so great money could not compensate. She conceded that money should be paid for the destruction of the property rights of our citizens. By the settlement between the two countries the United States surrendered the diplomatic claims of our citizens for the relinquishment by France of that country's national obligations against us. * * *

The spoliation claims as a class were valid obligations from France to the United States, and our Government surrendered them to France for a valuable consideration benefiting the Nation, and this use of the claims raised an obligation founded upon right.³⁰

In the allowances made by the Court of Claims no interest has been included. Senator Sumner, in his great report on these claims, said: "If interest be due on any national debt, it is difficult to see why it is not due here."³¹

Notwithstanding this statement of the national liability, interest has never even been asked for, nor has it been in fact allowed or paid.

The tenacity with which the claims, as well as the documents relating thereto, have been held in the hands of the families of the original owners is alluded to in an opinion of Chief Justice Richardson in the Court of Claims in the case of the Schooner *Industry*, 26 C. Cls. 249, 251:

It has been declared and often reiterated that these claims had largely ceased to be owned by the families of the actual losers, and had passed into the hands of speculators, who had purchased them at great discount and were besieging Congress by the aid of claim agents and others to pay the full amount of the original losses, by which great profits would accrue to them. Although emphatically denied, that allegation had come to be, if not believed, at least very much feared.

It was that idea which no doubt led to the insertion of the provision about assignees in the following section of the act of 1885, January 20, chap. 25 (23 Stat. L. 283):

³⁰ Brigs *Fanny and Hope*, 46 C. Cls. 214, 223, 224.

³¹ Senator Sumner's report on French spoliation claims, Compilation of Reports of Committee on Foreign Relations, U. S. Senate, Vol. I, p. 319.

"That the court shall examine and determine the validity and amount of all the claims, included within the description above mentioned, together with their present ownership, and, *if by assignee the date of the assignment, with the consideration paid therefor.*"

The same idea is again manifest in the proviso of the appropriation act making the first awards, and under which the present motion for a certificate is made.

It is due to truth and the facts of history to say that in all the cases already tried in this court, we find the claims to have been retained, with the papers, documents, and other evidence, in the numerous families of the original losers, with uncommon tenacity, still subject to distribution as assets of those who first made the losses.

The principles on which the court proceeded in the details of its allowances will be the subject of a later article.

GEORGE A. KING.

THE INTERNATIONAL LAW OF AERIAL SPACE.

I. THE LAW OF AERIAL SPACE IN TIME OF PEACE.

The invention of wireless telegraphy and recent improvements in the aeroplane and dirigible balloons have greatly extended the possibilities of international aerial communication and navigation, and have thus rendered necessary a discussion of the law of the so-called aerial domain in works on international law.

During its session at Ghent in 1906, the Institute of International Law adopted the following principles: "The air is free. In time of peace and in time of war, states have over it only the rights necessary for their self-preservation."¹ These principles, which were based upon the views of Fauchille² and accepted by a vote of 14 against 9, have been justly criticized. They are not in agreement

¹ Article 1 of the regulations adopted by the Institute of International Law for Aerostats and Wireless Telegraphy, 21 *Annuaire*, 327-29. Cf. Art. 3 of the rules adopted at Madrid in 1911 which states that "aerial circulation is free" saving the rights of the underlying states to take certain measures to ensure security. 24 *Annuaire*, 346. The rules adopted in 1911 have no great importance.

The following is the text of the remaining articles adopted at Ghent, in so far as they relate to the law of peace.

Art. 2. In default of special arrangements, the rules applicable to ordinary telegraphic communication are applicable to communication by wireless telegraphy.

Art. 3. Each state has the power (*faculté*), to the degree necessary for its security, to oppose, above its territory and its territorial waters, and to as great a height as it may find useful, the passage of Hertzian waves, whether these be emitted by apparatus belonging to the state or by private apparatus placed upon the earth, on board a vessel, or in a balloon.

Art. 4. In case of the prohibition of communication by wireless telegraphy, the government should at once notify the other governments of the prohibition it has made.

² For the extremely interesting and suggestive views of M. Fauchille, the brilliant and versatile editor of the *Revue Générale de Droit Int. Public*, see Bonfils (Fauchille) Nos. 531, 1-10; *Le domaine aérien* in 8 R. D. I. P. (1901), 414-490; *Rapports à l'Institut de Droit Int.* in 19 and 21 *Annuaire*, 19-86 and 76-87; 17 R. D. I. P. (1910), 55 ff.; and 24 *Annuaire*, 23-126.

with recent articles and monographs³ on this subject, and do not answer the practical necessities either of aerial navigation or wireless telegraphy, especially in time of war.

The correct principles were undoubtedly those formulated by Professor Westlake who proposed the following alternative article at the above-named session of the Institute: "The state has a right of sovereignty over the aerial space above its soil, saving a right of in-offensive passage (usage) for balloons and other aerial machines and for communication by wireless telegraphy."⁴

From the standpoint of state or municipal law there can be little, if any, doubt that the aerial space is subject to the territorial sovereignty of the state underneath, at least as far as it can be utilized or controlled.

Justinian tells us that the air, like the high seas, is by natural right common to all. In the sense that all can breathe it in as they have opportunity this is certainly true; but it can hardly be accepted as a proposition of jurisprudence with respect to its use for the support of a vehicle of transportation.⁵

There existed, however, another principle of the Civil Law which declared that the lord of the soil was also lord of the heavens (*dominus soli; dominus coeli*)⁶ which, with certain limitations and

³ See especially Judge Baldwin and Arthur Kuhn in 4 this JOURNAL (1910), 94 ff. and 109 ff.; Grünwald, *Das Luftschiff*, etc. (1908); Julliot, *De la propriété du domain aérien* (1909); Meurer, *Luftschiffahrtsrecht* (1909); Meyer, *Die Erschliessung des Luftraumes in ihrem rechtlichen Folgen* (1909); Schneeli, *Radiotelegraphie und Völkerrecht* (1908); Fleischmann, *Grundgedank eines Luftrechts* (1910); and Wilson in 5 *Am. Pol. Sci. Rev.* (1911), 171 ff.

⁴ See 21 *Annuaire* (1906), 297-99. Westlake's article received but three votes at the time of its proposal (1906) to the Institute, but it has since won wide support. Nearly all of the above named authorities are in substantial accord with its provisions.

⁵ Judge Baldwin in 4 this JOURNAL (1910), 95. He cites *Inst. I, 1 de rerum divisione*, § 1; and *Dig. I, 8, de divisione rerum*, § 2, 1.

⁶ Julliot, *op. cit.*, p. 7. The Roman tradition of ownership in the aerial space was revived in the later Middle Ages and came down to Blackstone through Coke upon Littleton. Blackstone says: "Land hath also, in its legal signification, an indefinite extent upwards as well as downwards. *Cujus est solum ejus est usque ad coelum* is the maxim of the law * * * So that the word 'land' includes not only the face of the earth, but everything under it, or over it." Cooley's *Blackstone* (4th ed.), Bk. II, p. 18. Cf. Coke upon Littleton (Thomas' ed., 1836), Bk. II. ch. 1.

modifications, appears to have been incorporated into our common law.⁷

Control of the aerial space by the territorial power underneath is necessary for various purposes in time of peace as well as in time of war. As far as the use of wireless telegraphy is concerned, it is necessary in order to oppose the passage of Hertzian waves to the degree that the security or interests of the state may demand.⁸ In respect to aerial navigation, it may be desirable or necessary in order to prevent espionage, to enforce the collection of customs duties, maintain sanitary and quarantine regulations, and prevent various crimes, particularly smuggling.

From the standpoint of international law, it would seem that the state underneath has a *limited* right of territorial sovereignty or jurisdiction over the aerial space above, at least as far as it can be utilized or controlled.⁹ The aerial space above the ocean or unoccupied territory is of course free; but this can hardly be claimed in respect to that portion of the atmosphere above the territorial waters

⁷ It is expressly incorporated into the codes of Germany, France and Switzerland. For citation and discussion of cases bearing on the rights of the owner of the soil in the United States, see Judge Baldwin and Arthur Kuhn in 4 *this JOURNAL* (1910), 102 ff., and 123 ff. As far as the state is concerned, the theory of ownership has of course been abandoned for that of *imperium* or territorial sovereignty. Grünwald appears to stand alone in clinging to the theory of *dominium* or ownership.

For citations from the German, French, and Swiss codes, see 4 *this JOURNAL* (1910), 98 f., 127 f.; Julliot, 7 f.; and Meurer, 13 ff.

⁸ Art. 3 of the rules of the Institute. See note, 1, *supra*.

⁹ Some publicists favor the division of the aerial space, for purposes of jurisdiction, into an upper and lower zone. Rolland (13 *R. D. I. P.*, 58 ff.) holds the atmosphere to be territorial to a distance of 330 metres. Fauchille favors exclusive control for purposes of self-defense to a distance of 500 metres (17 *R. D. I. P.* 60).

A number of the older authorities favor the rule or principle of the cannon shot; but, since modern aeronautic cannon are said to have a vertical range of 5,500, 7,400, and even 11,500 metres, this would render freedom in the upper zone wholly illusory. Besides, the analogy between the marine league or range of cannon shot as applied to the ocean and aerial space soon breaks down. In the case of the ocean, the reasons for control decrease in proportion to the distance from the shore; in the case of aerial space, the danger (as, *e. g.*, from the weight of falling bodies) may increase in proportion to the distance from the earth's surface.

(including the marginal seas) or above that part of the land surface which is inhabited by peoples organized into political communities.

The nature of this control appears to be analogous to that exercised over a state's territorial waters, more particularly the marginal seas, straits, and international rivers. Foreign airships should be granted a right of innocent or inoffensive passage; and, in general, the same rules must be applicable to them in the territorial atmosphere as are applied to foreign vessels in territorial waters. Their nationality will doubtless be determined by their flag or registry, and though in principle subject to the jurisdiction of the state above whose territory they pass, they will be practically exempt from its criminal jurisdiction except in respect to crimes which affect the interests or disturb the peace of its inhabitants.¹⁰

II. THE LAW OF AERIAL SPACE IN TIME OF WAR.

Very few positive rules or principles of international law applicable to aerial warfare have been thus far developed. The rules are largely inferential and speculative in their character, and are based upon generally recognized principles or analogous practices in land or naval warfare.

Many of the states represented at the Second Hague Peace Conference of 1907 agreed to "prohibit, for a period extending to the close of the Third Peace Conference, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature."¹¹ But this "Declaration" was only signed by twenty-seven states, and the signatories did not include four of the great maritime Powers.¹² It cannot, therefore, be regarded as an integral part of international law.

¹⁰ This would at least be the case with private airships. Public airships will probably enjoy the rights and privileges of so-called extraterritoriality as in the case of public vessels or warships.

¹¹ I H. D. (*Hague Declaration*) (1907); Higgins, *The Hague Peace Conferences*, 485-91. See select bibliography on p. 488.

¹² Viz: Germany, Italy, Russia and Japan. The remaining non-signatory Powers were Chili, Denmark, Spain, Guatemala, Mexico, Montenegro, Nicaragua (which has since adhered), Paraguay, Roumania, Servia, Sweden, and Venezuela.

The only conventional rule of international law of great importance bearing on the subject of aerial warfare is found in the Hague Regulations respecting the Laws and Customs of War on Land:

The attack or bombardment, *by any means whatever*, of towns, villages, habitations, or buildings which are not defended is forbidden (Art. 25).¹³

But the following rules bearing upon aerial warfare are also based on convention, though they are of minor importance:

Belligerents are also forbidden:

(a) To erect on the territory of a neutral Power a wireless telegraphy station, or any apparatus intended to serve as a means of communication with belligerent forces on land or sea;

(b) To use any installation of this kind established by them before the war on the territory of the neutral Power for purely military purposes, and which has not been opened for the service of public messages.¹⁴

A neutral Power is not bound to forbid or restrict, on behalf of belligerents, the use of telegraphic or telephonic cables or of wireless telegraphy apparatus, whether belonging to it or to companies or private individuals.¹⁵

It should be noted that Great Britain and the United States were among the signatories. Only 13 states had ratified or adhered to this Declaration by July, 1911.

¹³ H. R. (1907), Art. 25.

¹⁴ 5 H. C. (1907), Art. 3. This article was suggested by the experiences of the Russo-Japanese War when the Russians erected a receiving station at Che-foo in China for the purpose of communicating with Port Arthur by means of wireless telegraphy. See Hershey, 122, 124, 266-67; Higgins, 282 f; and Lawrence, *War and Neutrality in the Far East* (2d ed.), 218-20.

Art. 5 of 5 H. C. also makes it obligatory upon neutrals not to permit such acts on its territory. According to 13 H. C. (1907), 5, belligerents are particularly forbidden to "erect wireless telegraphy stations, etc.," in neutral ports or waters.

¹⁵ 5 H. C., Art. 8. Article 9 adds:

"Every restrictive or prohibitive measure taken by a neutral Power in regard to the matters referred to in Articles 7 and 8 must be applied impartially by it to the belligerents.

"The neutral Power shall see to it that the same obligation is observed by companies or private owners of telegraph or telephone cables or of wireless telegraphy apparatus."

Though there are no conventional rules bearing on the subject, it is clear from general principles or analogous customs of warfare at sea or on land that belligerents have the right of waging aerial warfare in the aerial space surrounding the ocean as well as in that above their own territory or above territory under their military occupation (including the marginal seas bordering on such territory). But they clearly do not have the right of using the aerial space surrounding the territory of neutral states (including their marginal waters) for military purposes.

It is also reasonably clear that belligerents have the right of forbidding or restricting the access to, or use of, the aerial space above belligerent territory by neutrals, if such restriction or prohibition is deemed necessary or desirable from a military standpoint.¹⁶ They have probably also the right to impose certain restrictions or prohibitions upon neutrals on the high seas within the zone or theatre of military operations.¹⁷ They may impose appropriate penalties for the violation of these rules.

Whether the so-called innocent passage of public belligerent airships through neutral aerial space or the utilization by such airships of neutral territory for such relatively innocent purposes as repairs, the procuring of necessary supplies, etc., is permissible, may be considered doubtful.¹⁸ It is also doubtful whether the custom of maritime warfare permitting the capture and confiscation of unoffending

¹⁶ According to the *Declaration of London* (Art. 24), "wireless telegraphy, as also balloons and flying machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying machines" may be declared conditional contraband.

Neutral airships would appear to be subject to the rights of visit and search, and liable to capture for carriage of contraband, attempt to enter a blockaded port, or unneutral service. They are liable to the appropriate penalties prescribed in such cases.

¹⁷ "Belligerents may prevent the emission of waves, even by a neutral subject, upon the high sea within the zone which corresponds to the sphere of action of their military operations." Art. 6 of the Regulations on Wireless Telegraphy adopted by the Institute of International Law in 1906. 21 *Annuaire*, 328.

¹⁸ Total prohibition of or abstention from such acts would be the preferable solution, as being more in accordance with the principles underlying the modern conception of neutral obligation. The prohibition would not necessarily apply to private belligerent airships.

private enemy property on enemy vessels applies to aerial warfare, or whether such property is exempt from seizure except for a purely military purpose, as in the case of warfare on hand.¹⁹

Balloonists and others engaged in aerial warfare, at least if properly enrolled and uniformed, are entitled to all the rights and privileges of lawful combatants. If captured, they should be treated as prisoners of war;²⁰ if found killed, sick, or wounded, they should be dealt with in accordance with the provisions of the Hague and Geneva Conventions.²¹

AMOS S. HERSHEY.

¹⁹ Here again the rules governing land warfare should be preferred. The practice of pillage or the taking of booty in maritime warfare is a mere historic survival with no real justification on military grounds. There seems to be no good reason for applying it to aerial warfare.

²⁰ These statements appear necessary in view of a disposition shown in some quarters to treat them as spies upon several occasions.

During the Franco-German War of 1870, Prince Bismarck threatened to treat balloonists crossing the German lines as spies. See 1 Guelle, 136.

Early in 1904 Admiral Alexieff also threatened to treat as spies correspondents on board neutral vessels "who may communicate news to the enemy by means of improved apparatus not yet provided for by existing conventions," in case any such "should be arrested off Kwan-tung or within the zone of operations of the Russian fleet." This declaration, which was communicated to the Powers by the Russian Government, was provoked by the presence in the Gulf of Pe-chi-li and adjacent waters near Port Arthur of Mr. Fraser, a London *Times*' war correspondent on board the Chinese dispatch boat *Haimun* equipped with wireless telegraphy apparatus. His dispatches were sent to a neutral station at the British port of Wei-hai-wei, whence they were transmitted to London.

On the case of the *Haimun*, see especially: Fraser, *A Modern Campaign* (1905); Hershey, *The Int. Law and Diplomacy of the Russo-Japanese War*, 115 ff.; Lawrence, *War and Neutrality* (2d ed.), 83 ff.; 1 Rey, *La guerre-russo-japonaise*, 368 ff.; and *Int. Law Situations* (1907), 159 ff.

The Hague Regulations (Arts. 13 and 29) include "newspaper correspondents and reporters" among the army followers entitled to treatment as prisoners of war; and expressly exclude "individuals in balloons to deliver dispatches, etc.," from the category of spies.

²¹ On the *Law of Aerial Space in Time of Peace*, see Baldwin, in 4 this JOURNAL (1910), 94 ff.; Bluntschli, Art. 632 *bis*; Bonfils (Fauchille), Nos. 531, 1-10; Blachère, *L'air voie et le droit* (1911); Dupuis in 14 R. D. I. P. (1907), 373; Fauchille in 8 R. D. I. P. (1901), 414 ff. and 17 R. D. I. P. (1910), 55 ff.; *Ibid.*, in 19 *Annuaire* (1902), 19-86; *Ibid.*, in 21 *Annuaire* (1906), 76 ff.; *Ibid.*, in 24 *Annuaire* (1911), 23 ff., 303 ff.; Gareis, in *Münchener Neusten Nachrichten*

(17 Feb., 1909), Nr. 39; Fleischmann, *Grundgedanken eines Luftrechts* (1910); Hazeltine, *The Law of the Air* (1911); Hilty in 19 *Archiv des öffent. Rechts* (1905), 87 ff.; Holtzendorff, in 2 *Holtzendorff*, 230; Grünwald, *Das Luftschiff*, etc. (1908); *Ibid.*, in 24 *Archiv Oeffent. Rechts*, Heft 2 (1909), 190-201, & 477 ff.; Julliot, *De la propriété du domain aérien* (1909); Jurisch, *Grundzüge des Luftrechts* (1897); Kausen, *Die Radiotelegraphie im Völkerrecht* (1910); Kenny, in 4 *Zeitschrift* (1910), 472 ff.; Kohler, in 4 *Zeitschrift* (1910), 588 ff.; Kuhn, in 4 this JOURNAL (1910), 109 ff.; Liszt (3d ed.), § 9, p. 76; Loubeye, *Les principes du droit aérien* (1911); Lyklama, *Air Sovereignty* (1910); Meili, *Das drahtlose Telegraphie* (1908); *Ibid.*, *Das Luftschiff*, etc. (1908); Meurer, *Luftschiffahrtsrecht* (1909); *Ibid.*, in 16 R. D. I. P. (1909), 76 ff.; Meyer, *Die Erschliessung des Luftraumes*, etc. (1909); 2 Mérygnac, 398 ff.; 1 Nys, 523-32; *Ibid.*, in 34 R. D. I. P. 501 ff.; *Ibid.*, in 19 *Annuaire*, 86-114; 1 Rivier, 140 f.; Rolland, in 13 R. D. I. P. (1906), 58 ff.; Schneeli, *Radiotelegraphie und Völkerrecht* (1908), §§ 7-13; Sperl, in 18 R. D. I. P. (1911), 473 ff.; Schroeder, *Der Luftflug*, etc. (1911); Ullman (2d ed.), § 86, p. 289, and § 147, pp. 426-27; Wilson and Tucker, § 57; Wilhelm, in 18 J. I. D. (1891), 440 ff., 171 ff.; Wilson, *Int. Law*, §§ 30, 43; *Ibid.*, in 5 *Am. Pol. Sci. Rev.* (1911), 171 ff. For fuller bibliographies, see Bonfils, Kausen, Meyer, Sperl, etc.

On Aerial Warfare, or the Law of Aerial Space in Time of War (with special reference to balloons, aeroplanes and wireless telegraphy), see: Boiden, in 16 R. D. I. P. (1909), 261 ff.; Bonfils-Fauchille, liv. IV, Nos. 1440, 2-8; Fauchille, in 19 *Annuaire*, 55-77; *Idem.*, in 21 *Annuaire*, 76 ff.; Hearn, *Airships in Peace and War* (2d ed.), 1910; Kausen, *Die Radiotelegraphie, etc.* (1910), 75 ff.; Kebedgy, in 36 R. D. I. P. (1904), 445 ff.; Mérygnac, *Les lois de la guerre sur terre* (1903), 197 ff.; Meyer, *Die Luftschiffahrt in Kriegsgesetzlicher Bedeutung* (1909); Phillipson, *Two Studies in Int. Law* (1908) 104 ff.; Philit, *La guerre aérienne* (1910); Rolland, in 13 R. D. I. P. (1908), 58 ff.; Schneeli, *Radiotelegraphie und Völkerrecht* (1908), 14-37; 1 Scott, *The Hague Conferences*, 649-54; *Int. Law Situations* (1907), 138 ff.; Scholz, *Drahtlose Telegraphie u Neutralität* (1905).

For fuller bibliographies, see Bonfils, Kausen, Meyer, etc.

RUSSIA'S LIABILITY IN TORT FOR PERSIA'S BREACH OF CONTRACT

On August 18/31, 1907, the Governments of Great Britain and Russia entered into the following agreement:

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, and His Majesty the Emperor of All the Russias, animated by the sincere desire to settle by mutual agreement different questions concerning the interest of their States on the Continent of Asia, have determined to conclude Agreements destined to prevent all cause of misunderstanding between Great Britain and Russia in regard to the questions referred to, and have nominated for this purpose their respective plenipotentiaries, to wit:

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, the Right Honourable Sir Arthur Nicolson, His Majesty's Ambassador Extraordinary and Plenipotentiary to His Majesty the Emperor of All the Russias;

His Majesty the Emperor of All the Russias, the Master of his Court Alexander Iswolsky, Minister for Foreign Affairs;

Who, having communicated to each other their full powers, found in good and due form, have agreed upon the following:

Arrangement concerning Persia.

The Governments of Great Britain and Russia having mutually engaged to respect the integrity and independence of Persia, and sincerely desiring the preservation of order throughout that country and its peaceful development, as well as the permanent establishment of equal advantages for the trade and industry of all other nations;

Considering that each of them has, for geographical and economic reasons, a special interest in the maintenance of peace and order in certain provinces of Russia adjoining, or in the neighborhood of, the Russian frontier on the one hand, and the frontiers of Afghanistan and Baluchistan on the other hand, and being desirous of avoiding all cause of conflict between their respective interests in the above mentioned Provinces of Persia;

Have agreed on the following terms.

I.

Great Britain engages not to seek for herself, and not to support in favour of British subjects, or in favour of the subjects of third Powers, any concessions of a political or commercial nature — such as concessions for railways, banks, telegraphs, roads, transport, insurance, etc. — beyond a line starting from Kasr-i-Shirin, passing through Isfahan, Yezd, Kakhk, and ending at a point on the Persian frontier at the intersection of the Russian and Afghan frontiers, and not to oppose, directly or indirectly, demands for similar concessions in this region which are supported by the Russian Government. It is understood that the above-mentioned places are included in the region in which Great Britain engages not to seek the concessions referred to.

II.

Russia, on her part, engages not to seek for herself and not to support, in favour of Russian subjects, or in favour of the subjects of third Powers, any concessions of a political or commercial nature — such as concessions for railways, banks, telegraphs, roads, transport, insurance, etc. — beyond a line going from the Afghan frontier by way of Gazik, Birjand, Kirman, and ending at Bunder Abbas, and not to oppose, directly or indirectly, demands for similar concessions in this region which are supported by the British Government. It is understood that the above-mentioned places are included in the region in which Russia engages not to seek the concessions referred to.

III.

Russia, on her part, engages not to oppose, without previous arrangement with Great Britain, the grant of any concessions whatever to British subjects in the regions of Persia situated between the lines mentioned in Articles I and II.

Great Britain undertakes a similar arrangement as regards the grant of concessions to Russian subjects in the same regions of Persia.

All concessions existing at present in the regions indicated in Articles I and II are maintained.

IV.

It is understood that the revenues of all the Persian customs, with the exception of those of Farsistan, and of the Persian Gulf, revenues guaranteeing the amortization and the interest of the loans concluded by the Government of the Shah with the "*Banque d'Escompte et des Prets de Perse*" up to the date of the signature of the present arrangement, shall be devoted to the same purpose as in the past.

It is equally understood that the revenues of the Persian customs of Farsistan and of the Persian Gulf, as well as those of the fisheries on the Persian shore of the Caspian Sea and those of the posts and telegraphs,

shall be devoted, as in the past, to the service of the loans concluded by the Government of the Shah with the Imperial Bank of Persia up to the date of the signature of the present arrangement.

V.

In the event of irregularities occurring in the amortization or the payment of the interest of the Persian loans concluded with the "Banque d'Escompte et des Prêts de Perse," and with the Imperial Bank of Persia up to the date of the signature of the present arrangement, and in the event of the necessity arising for Russia to establish control over the sources of revenue guaranteeing the regular service of the loans concluded with the first-named bank, and situated in the region mentioned in Article II of the present arrangement, or for Great Britain to establish control over the sources of revenue guaranteeing the regular service of the loans concluded with the second-named bank, and situated in the region mentioned in Article I of the present arrangement, the British and Russian Governments undertake to enter beforehand into a friendly exchange of ideas with a view to determine, in agreement with each other, the measures of control in question and to avoid all interference which would not be in conformity with the principles governing the present arrangement.

Early in 1911 the Persian Government, urged by the desire to rid itself if possible of the heavy indebtedness in which it was obligated to both Great Britain and Russia, decided to take steps for the rehabilitation of its financial system. The Persian *Chargé d'Affaires* in Washington was instructed to present the situation to the United States Government with the request that some informal indication be given by that government as to what Americans, if any, were competent and suitable to assist the Persian Government in its project. In compliance with the request thus made, the Persian *Chargé* was informed that, among others, Mr. W. Morgan Shuster was, in the opinion of the American Government, eminently qualified to take up the work in question. In view of these representations, Mr. Shuster became the Persian Government's choice and he decided to avail himself of the opportunity thus offered of attempting to restore that government to an economic basis consonant with its dignity as a member of the family of nations. Thereupon with the full knowledge of the Department of State he executed a contract with the Persian Government (an official copy of which was filed with the Department) whereby it was agreed that he should go

to Persia and apply himself for the space of three years to putting the Persian Government on a firm financial footing. In April, 1911, accompanied by four assistants of his own selection, he left the United States and arrived in Teheran in the early part of May. Almost from the day of his arrival it became plain that, however welcome his services might be to the Persians themselves, neither their performance nor his presence in Persia for the purpose of carrying them out was viewed by Russia in a friendly light. By the end of November it became apparent that if his presence at Teheran for the continued fulfillment of his duties as Treasurer-General of the Persian Empire — a post conferred upon him by the Persian National Council by the law of June 13, 1911 — was to depend solely on the will of Russia, it would swiftly come to an end. So unalterably had Russia determined upon ousting the American Treasurer-General that at that stage a Russian army of 8,000 men had invaded Persia and were at or on the way to Kasbin, a Persian town situated some one hundred and fifty miles to the southeast of the Caspian and eighty miles to the northwest of Teheran. Frequent so-called ultimatums were launched against Persia by the Russian Foreign Office the tenor of each and all being to the following effect: "If you do not break your contract with Shuster we shall send our army to do it for you." Great Britain looked on a passive spectator; the United States gave no sign; the Russian invader was pressing down from the north; there was fighting and the massacre of Persians at Tabriz; and late in December Persia, invaded by a hostile army with its van within two days' march of her capital, her appeals to St. Petersburg to have existing difficulties peacefully settled at The Hague ignored, and after the Constitutional Government was abolished on December 24, 1911 by a *coup d'état*, gave in. With expressions of the greatest regret, Mr. Shuster was informed that as a last resort, and to save, for the time being at least, the few remaining vestiges of Persian sovereignty, Persia was no longer in a position to live up to the obligations of the agreement entered into under such encouraging auspices ten months before.

This article does not call for a consideration of the part played by Russia in this affair viewed from the standpoint of national ethics.

Its purpose is merely to consider briefly the question of the liability of a state in international law for consummating the tortious breach of a contract between a state and the national of another state occurring under the peculiar conditions which characterize this case. It is true that the incident is closed and that therefore its features can only be approached from the academic standpoint. The Persian Government has voluntarily made a satisfactory adjustment of the contractual rights of Mr. Shuster and his assistants. By making this adjustment Persia has assumed and met obligations of no less amount or character than she would have incurred in justice, law and equity had she herself, of her own volition, and in cool deliberation openly violated the terms of the Shuster contract. She has not once officially expressed, nor, it is thought, held the view that either Mr. Shuster or his associates were in any way unequal to the task set before them, unwilling to perform the various duties connected therewith, or at any time during the course of their employment committed acts which could give Persia the shadow of a right to withdraw from the terms of the agreements made by her with one or any of them. No better evidence of the satisfaction and esteem in which the Americans were held by the Persian Government can be afforded than the amazing fortitude and pertinacity with which, long after threatened invasion by Russia, and for some weeks after the invasion had actually occurred having for its sole purpose the ousting of Mr. Shuster, it exhausted all means whereby it was hoped that his continued stay might be secured.

The first question presented is this: Has a nation a right in international law to avoid the obligations of a contract entered into between it and a national of another Power when as the direct result of insisting on living up to its terms the state finds itself invaded by a hostile Power under conditions which make resistance utterly hopeless? This question can admit of only one answer. Not only is it both the right and the duty of a state to avoid such an obligation as that presented by the facts in this case, but it is both its right and its duty to avoid any obligation, whether entered into with a private person or solemnized with those pledges of national faith which seal friendly compacts between nations, when to do otherwise would be

to incur even the slightest chance of a risk to the integrity of those inherent attributes of sovereignty the possession of which alone makes it possible for any state to enter into or live up to the terms of any agreement which it may perfect. To maintain its place in the family of nations a state must stand four-square whenever any attack upon its sovereign rights is threatened or apprehended; and as to the existence of the threat or the grounds of apprehension the state must necessarily be its own judge.

By none have these principles been more forcibly enunciated than by some of the greatest jurists who have ever sat upon the bench of the Supreme Court of the United States. By Article II of the treaty between the United States and China concluded November 17, 1880, it was agreed that Chinese laborers at that time in the United States should be allowed to go and come of their own free will and accord. By the Act of May 5, 1882, as amended by the Act of 1884, it was provided that Chinese laborers dwelling in the United States should before leaving this country obtain certificates identifying them as being located here which on being presented on their return should entitle them to re-entry into this country. On October 1, 1888, Congress passed an act absolutely prohibiting the return of any and all Chinese laborers at that time absent from the United States irrespective of whether or not they might have in their possession the certificates provided by the Acts of 1882 and 1884 identifying them as individuals who by virtue of the treaty of 1880 were entitled to enter and leave the United States of their own free will and accord. In the case of *Chae Chan Ping v. United States*, Mr. Justice Field said:

it must be conceded that the Act of 1888 is in contravention of express stipulations of the treaty of 1868 and of the supplementary treaty of 1880, but it is not on that account invalid or to be restricted in its enforcement;

and on numerous other occasions the Supreme Court has upheld the power of the state to enact laws in direct violation of treaty agreements and asserted that to take the view that the United States could not do this, or that it was not its duty to do so as a sovereign state, would be to assert that it had not the power to maintain intact the

sovereign right of determining who should or who should not enter or remain within its territory — a sovereign right which as Mr. Justice Field says in the case of *Chae Chan Ping v. United States* can not be abandoned or surrendered. (130 U. S. 581, 12 L. Ed. 1068.)

It is true that in these cases the judges have pointedly refrained from passing upon the national propriety of this violation of treaty obligations; that the only question before them was whether Congress, as the mouthpiece of the nation and within constitutional limitations, had the power to pass such acts; and that the principles enunciated by them had little or no application to the question as to whether the United States was liable in an international sense to the nation whose subjects suffered by this government's failure to live up to the terms of the agreement. But the principle which runs through all these decisions is that it is not only the right but the duty of a state to protect itself; and this is a principle which is generally recognized as a fundamental precept of international law. It follows that in refusing to carry out the contract entered into with Mr. Shuster and his associates, not only in the face of a very well-founded threat of invasion, but in the presence of an actual occupation of her territory by a hostile force and at least a temporary infringement of her sovereign rights, Persia, as a sovereign state, did her plain and simple duty.

The second question is: Granting that it is not only the right but the duty of a state to do all acts which, in its opinion, are necessary to avert a threatened injury to its sovereign rights, is it to be held liable in international law if, as the result of those acts, injury or wrong is inflicted upon another state either directly or indirectly?

Theoretically no state should be considered liable in international law for the result of acts which it was its right and duty to perform. But just as the offending state is the only judge as to the necessity of taking steps to guard its own safety, even at the expense of the interests of other states, so are those others the sole judges as to the advisability of pressing a claim for indemnity against the former for all acts thus committed. No matter how pure the motive of the national act, the injury has been done to the second state; as a matter of justice the offender should indemnify the injured party for the

harm done; as a matter of international law the latter has the right to demand satisfaction; but whether or not the demand will be made is purely a matter of national policy.

The policy long followed by the State Department of the United States regarding the presentation of claims for indemnity arising from failure on the part of foreign states to execute the terms of contracts into which they have entered with American citizens abroad, is that while, generally speaking, claims of a purely contractual nature will not be diplomatically pressed against a foreign state, such claims, although contractual in their origin, will be made the subject of diplomatic intervention when it appears that their breach is the result of arbitrary or tortious acts on the part of the contracting state, and the claimant's hands are clean. But where the nature of the breach is violent, capricious or arbitrary — where an element of tort, of positive deliberate wrongdoing is injected into the breach of contract — a new element is introduced, and one which no state can entirely overlook and hope to maintain the dignity and respect due it as a member of the family of nations: that of bad faith on the part of the offending state in its relations with the claimant state. In such cases the policy of the United States has always been to present its claim on behalf of its injured citizen and to seek to obtain by direct intervention through diplomatic channels the satisfaction which it is thought proper to demand. It is unnecessary to add that the settled policy of the Department is to intervene diplomatically on behalf of American citizens where it appears that their claims are based on injuries resulting from tortious acts committed by the authority of foreign governments not having their origin in contractual engagements entered into by such governments with citizens of this country.

But the officials of the Persian Government who communicated to Mr. Shuster the fact that it was no longer possible for him to exercise his duties as Treasurer-General did so under the spur of the most urgent necessity. No better proof of the perfect good faith which Persia observed throughout the entire episode can be submitted than the fact that it promptly and of its own motion, made a satisfactory settlement with Mr. Shuster and his American associates. It was

with the most poignant regret that Mr. Shuster's resignation was requested; and this was only done at the point of eight thousand Russian bayonets.

Let us suppose, however, that Persia had taken the view that, Mr. Shuster's departure having been rendered a necessity against the will of the government, against her urgent protest to Russia, she was not, as an innocent party, liable for the payment of damages ensuing from the breach of the Shuster contract. Would her immunity from liability find its source in the departmental policy not to press purely contractual claims diplomatically? Would not the answer be to the effect that, although it might be admitted that the contract had, as a matter of fact, been broken against the desire and in spite of the opposition and protest of the Persian Government, its breach was, nevertheless, due to arbitrary and despotic means employed in Persian territory, and that the rule was therefore mistakenly invoked? If, on the other hand, Persia, in the supposed case, should have based her immunity from liability on the theory that as a nation she was not responsible for injuries resulting from the invasion of her territory by the armed forces of a third Power which it would have been suicidal for her to attempt to oppose, could she have been properly met with the reply that it is as yet too early in the development of international law to justify an analogy between the case where private law places the responsibility upon the actual doer of the wrong rather than the passive instrument which he uses for the purpose of bringing the wrong about, and the situation in international law presenting the same state of facts existing between two members of the family of nations?

Happily we are not without precedent in regard to this point. Professor Moore, in his *International Arbitrations*,¹ quotes from the notes of Mr. Kane, one of the United States Commissioners in the negotiations the object of which was to obtain an indemnity from France for spoliations committed by order of Napoleon against American commerce at the end of the first decade of the last century. Mr. Moore points out that, apart from spoliations in which the

¹ Vol. V, p. 4473.

agency of the French Government through its own officers was in question, there was a large class of cases in which it was alleged that France influenced or compelled other nations to commit wrongs. This allegation especially affected claims growing out of spoliation in Holland and Denmark. (p. 4473.) Says Mr. Kane:²

Holland, after some ten years of political changes, during which, though nominally independent, she was tributary to all the projects of France, had received in the month of June, 1806, a king of the Napoleon family. But it was manifest that in placing Louis upon the throne his brother had not renounced his control over the affairs of that country. The form of distinct sovereigns was present to the public eye; but the energies of the Dutch people were directed more than ever to the advancement of the Imperial policy. At last in the concluding month of 1809 a new crisis approached. At a moment when the finances of Holland were in a state of extreme embarrassment she was required to destroy her commerce with foreign nations which formed the principal source of her revenues. Louis ventured to remonstrate and delay compliance with the mandate. He was reminded in reply that the country of which he was sovereign was the French conquest and that his highest and imprescriptible duties were to the Imperial crown; and it was announced to him in terms which could not be mistaken that the project of uniting Holland to the Empire was already matured and that its consummation could only be postponed by his unqualified obedience. Among the most decided, though not the first tests of his submission, as he has since declared, to the world, "the pretended treaty of the 16th of March, 1810, which was in fact a capitulation, was presented to him to be ratified." "It was imposed," he adds, "by the Emperor," and a prisoner, as Louis was at the time at Paris, he had no choice but to yield. The French armies had forcibly possessed themselves beforehand of several of the Dutch fortresses; French officers of the Customs occupied all the ports and outlets of the kingdom; and Napoleon, confounding apparently his purposes with their execution, had already directed his decrees to the authorities of Holland as if it was one of the departments of France. The assent of the king, however, did not avail to prolong his reign. The troops of his brother continued to advance, they menaced Amsterdam, the popular feeling was inflamed and, in the vain hope of averting a new revolution, Louis abdicated on the first of July in favor of his son. It was unnecessary; the Emperor's arrangements were already made: a decree of 13 articles was issued on the 9th from the palace of Rambouillet, the first of which declared that Holland was united to the Empire.

² Notes on some of the questions decided by the Board of Commissioners under the Convention with France of the 4th of July, 1831, Philadelphia, 1836 — Moore, *Int. Arb.*, Vol. V, p. 4473.

The tenth article of the treaty of the 16th of March, 1810, provided that all merchandise that had arrived in American vessels in the ports of Holland since the 1st of January, 1809, was to be placed in sequestration and belonged to France. The result of this was that every American cargo without reference to the date of its importation was sequestered at once and the greater number thereof sold at the Emperor's order and the proceeds received at Paris. "It was for the value of these cargoes," says Mr. Kane, "that reclamations were made before the commissioners * * * Holland was already a dependent kingdom and Louis a merely nominal sovereign. The treaty was a form; in substance it was an Imperial decree." The claims against Denmark, remarks Mr. Kane,

present a train of wrongs unworthy of the state unquestionably sovereign and protesting to be free, committed against the citizens of a friendly nation who have violated no law and were entitled to protection by every title of hospitality and justice, but the question before the board regarded not Denmark but France. One cannot be charged with the acts of the other, for neither was dependent. It may be that the conduct of King Frederic was dictated by his anxiety to conciliate the favor of the French Emperor; * * * we had nothing to do with his motives or his fears. The act was his own; the kingdom of Denmark was then, as now, independent. * * *

This is the broad distinction between the cases of Holland and Denmark. The former was a nominal, the latter an actual sovereign. The intervention of one was merely formal, and was exacted by force; the other was the voluntary pander to French avidity.³

Here, then, is a case in the diplomatic history of our own country where we not only insisted upon but obtained from a sovereign state the payment of indemnity for wrong inflicted against American citizens in the territory of another nation at the former's instigation supported by force which it would have been folly to oppose. To state that the action of Persia in terminating Mr. Shuster's contract was anything but formal, or was not exacted by the application of armed force by Russia, would be to make an assertion directly opposed to the facts. Just as at the time of the spoliation offered to our commerce Holland had in Louis a crowned sovereign at the head of the state, so Persia was at the time of Mr. Shuster's dismissal

³ *Ibid.*, p. 4476.

under a constitutional form of government, where powers were vested in a national elective assembly called the Mejliss, with a constitutional ruler represented during his minority by the Regent; just as in 1809-10 Holland was recognized by the whole of Europe as a sovereign state, so Persia in 1912 was, and still is, officially recognized as a member of the family of nations; but is she on that account to be considered to have exercised, any more than Holland, independent sovereign control over acts which she was forced to commit at the bayonet's point? It would seem not, if the principle on which so much of the French indemnity of 1831 as was paid in reparation of the loss of the vessels confiscated in Dutch ports can be said to receive the sanction of the law of nations.

The result of the doctrine enunciated by Mr. Kane, supported by this government and conceded in the particular instance by France,⁴ is that the responsibility for tortious acts committed in the territory of a state which is sovereign on paper only, and perpetrated at the arbitrary dictation of a superior Power, supported by threats of invasion or by actual invasion, is not to be avoided by the real author of the wrong merely because not committed within the territorial limits of the latter, and not carried out through the immediate intervention of its own officials. In other words, that the existence of sovereignty, shadowy though it is, in the innocent state, does not negative the idea of responsibility on the part of the government whose act is, in fact, the direct cause of the injury. It would be in vain for Russia to point out that whereas, in the Holland case the injury was the direct result of a tortious act dictated by Napoleon, the Shuster case presents a simple breach of contract; that the parties thereto were Persia and Shuster, and, not being a party, Russia could not be held for the breach. It is the lack of good faith evidenced by the tortious

⁴ On May 10, 1836, President Jackson * * * informed Congress that the first four installments under the convention had been received. H. Ex. Doc. 254, 24 Cong., 1 Sess. The rest of the money was duly paid. S. Ex. Doc. 351, 25 Cong., 2 Sess.; H. Ex. Doc. 417, 25 Cong., 2 Sess.; H. Ex. Doc. 183, 26 Cong., 1 Sess. The six installments with interest yielded \$5,558,108.07. As the aggregate of the awards was \$9,362,193.27, the dividends, to the payment of which the fund was devoted, amounted to 59 $\frac{9671}{10000}$ of the whole sum awarded. H. Ex. Doc. 183, 26 Cong., 1 Sess. Moore, *Int. Arb.*, Vol. V, p. 4468.

methods by which the breach was brought about that gives the right to redress; and the contractual feature is mainly material in that it serves as a basis for the measure of damages to be awarded by way of indemnity for the injury inflicted.

In the agreement between Great Britain and Russia, Persia was divided into three separate spheres; a British sphere, a Russian sphere and a neutral sphere. The fact that Great Britain and Russia agreed as between themselves to maintain a policy of non-interference in their respective interests within the zones defined in the arrangement, while not of itself a violation of Persia's sovereign rights, had, at least, this significance: first, that the state within whose limits the respective rights of the parties to the agreement were to be observed, did not appear even as a shadowy factor in the arrangement; and, second, that the "control" which either party might find itself called upon to establish on the happening of the contingency mentioned in Article V, pointed to the possibility of the exercise by foreign Powers of paramount authority over the internal affairs of a third state, which might well take on the form of acts perilously akin to an infringement of sovereign rights.

While the presence in the instrument of the so-called "guarantee" of the integrity of Persian sovereignty is, of itself, an indication that those who entered into that arrangement were not unaware of the political significance which other nations might be inclined to attribute to such an arrangement, and found themselves under the necessity of rebutting the somewhat natural presumption that, should the parties to the agreement assume control in the event of irregularities in the amortization or the payment of interest on the Persian loans, the result would be in fact, if not in theory, an attack on Persian sovereignty. However far this "guarantee" might have served as a balm to Persia's wounded self-esteem or to conceal from the governmental consciousness the inherent political possibilities of the arrangement, its insertion in the instrument does not appear to have been taken seriously by the British public. In fact it is worthy of remark that the issue of the *London Times* of November 11, 1911, takes Mr. Shuster severely to task for not having recognized the fact that Persia was, since the Anglo-Russian agreement, no longer an

independent state, but a ward, so to speak, of the two great Powers. If this view is correct, and Persia was, at the time of Mr. Shuster's contract, the ward of Russia, at least so far as transactions to be performed in its northern sphere were concerned — the entrance upon the contract relation and upon the execution of its terms might, it would seem, either be assumed to be the act of Russia as well as of Persia, or the act of Russia alone. If under these conditions Russia is to be held as a guardian with limited powers, one of which was the right to select Persia's financial advisers, it would seem that, assuming that in entering into the Shuster contract, Persia had acted beyond the scope of her authority, her action was, nevertheless, ratified by Russia by the failure of the latter officially to assert her authority before the negotiations, which terminated in the signing of the contract, were completed. Russia, by her inaction, might well be said to have made Persia's act her own, and by forcibly bringing Mr. Shuster's contract to an end, to have become liable on the contract. If we assume that Russia's intervention was merely incidental to a general authority born of the Anglo-Russian agreement, to which Persia was in no sense a party, it would necessarily seem to follow that not only would Russia be liable for the consequences, but that Persia would be exempted from all responsibility.

Whatever may be said as to the limited nature of the control over the so-called northern sphere of interest, to which, by the Anglo-Russian agreement, Russia was entitled, or felt herself entitled to exercise so far as England was concerned, and assuming that it was in the exercise of such control as she could claim thereunder, that she undertook to invade Persia for the avowed purpose of expelling Mr. Shuster, there can be no doubt that according to her interpretation of the agreement, matters pertaining to the regulation of Persia's finances — including therein the right to declare what officials should be employed for that purpose — were wholly within her sphere of interest and regulation. The conditions imposed by the Russian ultimatum that Persia should in the future appoint no foreigners to official posts without the consent of the Russian and British Governments were no more nor less than a prohibition against the exercise by that government of purely sovereign prerogatives, the title to which

— at least in the northern sphere of interest — Russia thereby indicated, all too clearly, was, in her opinion, vested in herself alone.

It is, however, difficult to avoid the conclusion that at least up to the time of the invasion of Northern Persia by Russian troops for the purpose of asserting what Russia chose to consider her authority in matters pertaining to the domestic affairs of the Persian Government, there had been no direct attack on Persian sovereignty. The mere fact that Great Britain and Russia agreed not to interfere with the grant of, or seek concessions in the divisions of territory mentioned in the agreement, did not of itself tend to diminish Persia's political rights over the respective spheres; nor was the agreement concluded between the parties that on the happening of a given contingency, each would, as between themselves, be authorized to establish control over the sources of Persian revenue situated in the regions described in Articles Nos. I and II, tantamount to a declaration that at least prior to such interference Persia's national authority was not paramount in the spheres in question. It follows that, although the agreement tended materially to lessen the prestige of the Persian Government as a member of the family of nations in that it foreshadowed the possibility of the exercise of such foreign control over her domestic affairs as might lead to a diminution of her sovereign rights, Persia remained after, as before its execution, a sovereign Power.

Assuming the correctness of the proposition that the history of international intercourse is not without its precedents which hold that a third party in international law may be held liable for wrongs which it inflicts by means of duress brought to bear upon a second party in international law, there remains to be considered whether the nature of the act committed by Russia is such as would give rise to a just claim for indemnity on behalf of the persons injured.

Just what has Russia done to Mr. Shuster? She has driven him out of Persia by employing a force of 8,000 men, violating the property rights which he acquired by entering into his engagement with the Persian Government, and which he was faithfully carrying out according to the terms of the contract. Let us suppose that it was Russia and not Persia who invited Mr. Shuster to rehabilitate her

finances, and that at the end of six months, and while he was conscientiously carrying out the duties which he had engaged himself to perform, he had been informed by the Russian Government that his services were no longer required, and that unless he desisted from their performance and left the country he would be expelled by force. No student of international law or of the recognized modes of intercourse between nations would hesitate for a moment in coming to the conclusion that the matter would be one for settlement at the Hague Court, and that that tribunal would, on the facts given, find that Mr. Shuster was entitled to an indemnity for a tortious breach of contract broken in bad faith by the government which had thus employed him.

Does the fact that Russia saw fit to bring this result about by invading the territory of a nation with whom she and the United States were at peace, and by enforcing Mr. Shuster's departure by the use of her military forces instead of her municipal police, alter her responsibility in this matter? Can the fact that she invaded with a hostile force territory as yet under the nominal rule of a nominal Persia with the avowed purpose of bringing about Mr. Shuster's departure, serve to clothe a proceeding which, had it been performed within her own territory and through her own police authorities, would have amounted to a flagrant private wrong, with the dignity of an act of war?

Russia is scarcely in a position to contend that the invasion of Persia was any more than a legitimate resort to the use of means adequate to rid the northern sphere of the territory of its ward from the presence of obnoxious foreigners. It is not for a moment to be supposed that Russia, who, jointly with Persia, was a signatory to the convention ratified March 10, 1908, by which the high contracting parties bound themselves not to engage in mutual warfare, except after a public declaration announced to that effect,⁵ would depart from principles to which she had subscribed as one of the first promoters and most earnest advocates of the great international peace movement which has enlisted the sympathies of the world during the

⁵ Articles I and II of the convention regarding the opening of hostilities, Hague Peace Conference 1907.

past ten years. She can only be assumed to have taken this step inspired by the conviction that, within the limits of the authority conferred upon her by the Anglo-Russian agreement, she had a right to do so; and while it must be conceded that as between herself and the United States she was necessarily the only judge of her rights in this matter, this fact could not relieve Russia from the consequences of an act deliberately planned and as deliberately carried out by her in her capacity as a sovereign state.

But let us assume for the moment that the invasion of Persia is to be regarded as an act of war — not in the sense of a *casus belli* — but as the first of a series of hostile acts which, between nation and nation, constitutes a state of war. Is the breach of Mr. Shuster's contract to be considered as an injury incident to or coming in the track of war and as such incapable of giving rise to any just ground of indemnification? The whole history of the Russo-Persian embroilment makes it plain that the termination of Mr. Shuster's contract, and the destruction of the property rights originating therein, far from being incidental to the hostile acts performed by Russia on Persian territory was the true *raison d'être* of the political situation which resulted from the invasion of Persia by the Russian troops.

Again, can it be said that a nation which is successful in bringing about the result which caused it to resort to armed conflict is responsible in damages for having carried out its object? As between belligerent states the answer must necessarily be in the negative since the vanquished is hardly in a position to collect indemnity from the victor, and the latter is the only tribunal to decide upon the amount. But it is thought that no one would venture to assert that a tortious act committed under conditions which partake of the outward manifestations of a belligerent act would not render the offending state liable to the payment of indemnity merely because the offended state may choose to enforce its claim through diplomatic channels rather than by open war. Russia took the view that she had the right to say who should and who should not be Persia's financial advisers; in the exercise of this right she chose to take steps the result of which was to break Mr. Shuster's contract and to cause him to leave Persia; and the fact that she decided to employ her

military forces to attain her object merely indicates that, in her opinion, the employment of this means was no more than adequate to bring about the results which she desired to obtain. The fact that Russia made use of the military arm aggravates, if anything, the commission of the tort in that it accentuates the fact that she was determined to commit it even at the risk of forcing a bloody and ruinous war upon her defenseless neighbor; and merely because the commission of the tort involved the invasion of a territory over which she claimed a control of which the invasion itself affords the best proof, she can not claim exemption from liability on the ground that Mr. Shuster's departure was no more than a necessary incident to the existence of hostilities between herself and Persia. If war in truth existed — which for reasons already given Russia can not be heard to contend — it was a war conducted for the sole purpose of destroying the contract rights of American citizens; the accomplishment of an act by the use of the public forces of a state which, if brought about by the municipal authorities, would have rendered her liable to a just claim for indemnity. The greater the force employed the greater the wrong. If the United States did not choose to retaliate in kind, who shall say that this is an admission that no just ground for such a claim existed or that Russian liability remained any the less through failure to enforce it?

In answer to the suggestion that Russia's actions were directed against Mr. Shuster as a Persian official and not as a citizen of the United States, it must be admitted that it was not, in view of our generally accepted doctrine of noninterference in the internal affairs of other nations, incumbent upon the United States to support and maintain him in his official capacity as Treasurer-General of Persia. With Russia's policy toward Persia this country had and has no direct or immediate concern. Public opinion is not as yet educated up to the standard of justifying intervention by one or more states when in its or their opinion the sole object of intervention is to put a stop to what may appear the perpetration of a gross national wrong. The question of right or wrong as between nations will never be decided until it is passed upon by public opinion encouraged to repressive action by a general sanction, whether taking the form of joint coercion

- directed against the offending state, or of binding decrees rendered by those selected by the nations to pass as a tribunal upon the issue of each particular case, and to sit as supreme judges of the event.

But if the United States was not authorized to take action against the exercise of Russian authority in Persia, even if the exercise of the power she chose to assume was to result in the deposition of the Treasurer-General, this country was entitled to insist that were steps to be taken to that effect, Mr. Shuster should be protected in his rights of person and property, including the right accruing from his contract with the Persian Government. In pursuance of this duty the Department dispatched a note on the first day of December, 1911, stating that it would insist on the observance of the guarantees of person and property which Mr. Shuster as an American citizen had a right to expect.

What action would have been taken, or against whom demand for reparation would have been directed is an open question, since the Persian Government at once and of its own accord arranged a settlement with Mr. Shuster and the American members of his staff. But it would seem that had not Persia acted with such promptness in the matter, the question of Russia's liability could not well have been avoided. It is not to be presumed that the Department would have advocated the propriety of pressing a claim for indemnity against Persia for damages resulting from an act committed against her earnest protests, in utter disregard of her sovereign rights, and in which she took no voluntary part. In preferring a claim against the Russian Government the Department would have had the sanction of the most elementary principles of right and justice supported by the precedent afforded by the negotiations resulting in the payment of the French indemnity in 1831, in which this country was so ably represented by Mr. Kane and his associates. On the other hand, to have refrained from presenting a demand against Russia, had the necessity therefor arisen, would have established the precedent that while this government will seek redress from a sister state for injuries resulting from a tortious act committed by that state within its own territory, it will not do so when the wrong is accomplished by means of the employment of the military arm within the confines of

a state too weak to offer effectual protest against this exercise of despotic power; and that henceforth foreign states may feel themselves at liberty to destroy with impunity contract rights vested in American citizens by virtue of agreements entered into by them with third countries with the general consent and approbation of this government and of its people.

CLEMENT L. BOUVÉ.

IS HUDSON BAY A CLOSED OR AN OPEN SEA? *

Many of the foremost juriconsults of the world, representing many nations, have in the eighteenth and nineteenth centuries stated that Hudson Bay, a great North American sea, is a part of the open sea, and consequently free to the vessels of all nations for the purposes of navigation and fishing. This seems to have been a generally accepted doctrine until the close of the nineteenth century. Within recent years, however, the Dominion of Canada has set up the claim that all American vessels that enter Hudson Bay to catch fish or hunt whales must pay a license. The maintenance of such a policy would be tantamount to making of Hudson Bay a closed sea (*mare clausum*).

It is of course an attribute of a nation possessed of a maritime coast, that it can reserve in its territorial waters for its own subjects, the right of fishing, while in the open sea beyond its territorial waters, the subjects of all Powers have the right to catch fish equally, unless by immemorial usage, as in the case of the Ceylon pearl fisheries, a nation has obtained a prescriptive right beyond the conventional extent of territorial waters, to harvest the products of the sea.¹ The best way to find out whether a pretense of sovereignty over Hudson Bay on the part of Canada is sound or not, is to examine first, what is meant by the freedom of the seas, and how that freedom arose and expanded; and second, the extent of territorial or marginal waters over which the sovereignty of nations with sea fronts extends.

* This article is the English version prepared by Mr. Balch, with variations and some additions, of an article in French, "La baie d'Hudson, est-elle une mer libre ou une mer fermée?", that he contributed at the end of last year to the *Revue de Droit International et de Législation Comparée*, Brussels, second series, Volume XIII, pages 539-586.

¹ Vattel, *Le Droit des Gens ou Principes de la loi naturelle* (1775), Vol. I, p. 140; Wharton, *Digest of International Law* (1887), Vol. III, p. 38; Twiss, *The Law of Nations* (1897), Vol. I, p. 312; Rivier, *Principes du Droit des Gens* (1896), Vol. I, p. 243; Oppenheim, *International Law* (1905), Vol. I, p. 242; Fiore, *Nouveau Droit International Public* (1885), Vol. II, p. 88.

I.

Originally, in remote antiquity, the sea was free to all. But from the earliest historic times it was infested by pirates. Such was the case in the Cretan and Mykenean period of the Greek States, and perhaps the famous siege of Troy, as Sir Henry Sumner Maine suggests,² was the result of a maritime piratical expedition. The Roman juriconsults recognized in the civil and the public law that the sea can not be appropriated. Ulpianus³ maintains that the sea is open by nature to everyone; and Celus⁴ says that, like the air, the sea is common to all mankind. "In a state of nature," Marcianus⁵ writes, "there are things that are common to all, such are the air, running water and the sea." Nevertheless, after the fall of Carthage, the Mediterranean Sea passed more and more under the power of Rome. That great inland sea, which was the center of the ancient world, as well as parts of the ocean outside of the Pillars of Hercules, such as the British Channel, Rome dominated by means of her fleets. After the fall of the Roman Empire, when out of the chaos that prevailed in Europe for a time, new sovereignties began to arise, a movement started which extended slowly and gradually the claim to dominion over the sea, probably to insure security against piracy, until in the Middle Ages most sovereigns, whether emperors, kings, republics, towns or lesser individual potentates, laid claim to the possession, not only to more or less large parts of the land, but also of rivers, lakes and the salt water. Thus from early times the English sovereigns asserted sovereignty to a large area of the seas surrounding the shores of England, *mare anglicanum circumque*. Possessed of more vessels than their neighbors across the narrow seas, and so being "able to sweep the channel," as Chief Justice Cockburn in the case of *The Queen v. Keyn*, says,⁶ the English kings in the fourteenth century "asserted the right of sovereignty over the narrow seas." Later they made even more extended claims. Albericus

² Maine, *International Law* (1888), p. 77.

³ Ulpianus, L. 13, pr. D. VIII, 4, *Mari quod natura omnibus patet*.

⁴ Celus, L. 3. d. XLIII, 8, *Maris communem usum omnibus hominibus ut aëris*.

⁵ Marcianus, L. 2, sec. 1, D., 1, 8. *De divisione rerum et qualitate*.

⁶ Law Reports, 2 Exchequer Division (1876), p. 174.

Gentilis invoked this doctrine in his *Advocatio hispanica*, when, upon the order of Queen Elizabeth, the English fleet seized in the open sea off Lisbon some vessels of the Hanseatic League that had sailed round the north of Scotland without obtaining the permission of the English Government. The seafaring races of the north of Europe also made extensive claims to dominion over the sea.⁷ Eric X, King of Denmark and Norway, declared to Henry V of England, that no one had ever had permission to trade or fish in the Norwegian seas without a special license of the King of Norway.⁸ In 1490 John II of Denmark and Norway, and Henry VII of England, agreed by a treaty that English vessels should, upon taking out licenses every seven years from Denmark and Norway, have the right to sail over and fish in the seas between Norway and Iceland.⁹ During the Middle Ages the Germanic emperors claimed the title of Kings of the Ocean. The Sultan of Turkey assumed and exercised sovereignty over the seas adjoining his territory.¹⁰ Though the Adriatic Sea was many more miles across from shore to shore than could be seen from the masthead of a vessel, and was not even wholly bordered by Venitian lands, yet the queen city of the Adriatic claimed,¹¹ and later the famous historian of the Council of Trent, Father Paul Sarpi,¹² supported, with his able pen, the claim that the sovereignty of the Lion of St. Mark extended over the northern part of that inland sea, and exacted a heavy toll from all vessels navigating it. And when Ancona and Bologna, protesting against this taxation on their commerce, resisted, Venice subdued them in war and forced them to submit to the levy of the toll. Genoa and Pisa likewise asserted their possession, the former of the Ligurian and the latter of the Tyrrhenian Sea.^{12a} Spain and Portugal laid

⁷ René Waultrin, "La question de la souverainete des Terres Arctiques," in *Revue Générale de Droit International Public* (1908), p. 403.

⁸ Selden, *Mare Clausum*, lib. II, ch. XXXII, p. 448.

⁹ *Ibid.*, lib. II, ch. XXXII, p. 450.

¹⁰ *Ibid.*, lib. I, ch. XIX, p. 119.

¹¹ *Ibid.*, lib. I, ch. XVI, p. 99.

¹² Paolo Sarpi, *Del Dominio del Mare Adriatico e sui Reggioni per il "Jus Belli" della Serenissima Rep. de Venezia, Venet, 1676.*

^{12a} Selden, *Mare Clausum*, lib. I, ch. XVI, p. 105.

claim to sovereignty over vast tracts of the sea, Spain to the Pacific Ocean and the Gulf of Mexico, Portugal to the Indian Ocean and to the part of the Atlantic Ocean south of Morocco, with prohibition to foreign vessels from navigating in those seas.

The freedom of the sea, however, began to find defenders. In the fourteenth century, Ange de Ubaldis, who was born at Perugia, in commenting on a treaty concluded between Genoa and Venice, says that "the sea and its shores are common property as are water and air, by virtue of the law of nature and the law of nations."¹³ In the first quarter of the sixteenth century, Nicolas Everardi, president of the Grand Council of Malines, asserts the freedom of navigation on all seas and rivers. And the extravagant Spanish and Portuguese claims were repudiated by the States-General of the Netherlands. Queen Elizabeth of England, in a famous reply to Mendoza, the ambassador of Philippe II of Spain at her court, in contradiction to the policy of the sovereigns of England in claiming dominion over the seas around England, maintains the freedom of navigation over the open sea as against the exclusive claims of Spain and Portugal. After Drake's return from a voyage around the world in September, 1580, with a mass of plunder that he had taken from Spanish vessels and settlements on the coast of South America, the Spanish Ambassador carried a complaint directly to the English Queen. In her reply, after pointing out that Drake is amenable to a personal action in the English courts in case he has injured any one, Elizabeth goes on to say that the Spaniards have no right to exclude the English from trading with the West Indies. And Camden tells us that the Queen went on to say:

Moreover all are at liberty to navigate that vast ocean, since the use of the sea and the air are common to all. No nation or private person can have a right to the ocean, for neither the course of nature nor public usage permits any occupation of it.¹⁴

It was the exaggerated pretensions of the Portuguese that caused Hugo Grotius primarily to write his first important work, *De jure*

¹³ Ange de Ubaldis, *Consilia Consilium*, cited by Ernest Nys, *Les Origines du Droit International*, Brussels (1894) p. 381.

¹⁴ Camden, *Annales*, s., a., 1580 (edition of 1605), 309.

prædæ, which he never printed. But in 1609 a chapter of this work, his essay entitled *Mare Liberum* — in which he maintained with lucidity and force the right of Dutch vessels freely to navigate over the East Indian seas — was published at Leyden. An abler piece of argumentation than this celebrated essay of Grotius was John Selden's no less renowned treatise, *Mare Clausum*.¹⁵ Selden's book was a reply to Grotius' essay, and is the ablest presentation ever written of the view that the sea can be appropriated. Written in answer to the Dutch jurist's argument, it was not printed until a number of years later. It was published at London in 1635 at the behest of King Charles I of England, who wished to justify upon legal grounds the claim of England to sovereignty over the seas adjoining her shores.¹⁶ While most nations have argued sometimes on one side, sometimes on the other side of this question, according as their individual interests seemed to warrant at the time, the decision of the world has been gradually more and more favorable to the view maintained by the celebrated Hollander. Selden was the abler pleader, but Grotius was the sounder thinker; and today practically all nations and jurists recognize that the high seas are free to the commerce of the vessels of all nations. The basic reason for this now universal recognition of the freedom of the sea is that it is not capable of permanent occupation. The meagre extent of the sea over which a war vessel can exercise control from where she may happen to be, is infinitely small as compared with the sea as a whole, and even that control is only momentary.

Grotius in his *De jure Belli ac Pacis*, however, recognized that a state has a right to exercise its control over the marginal waters

¹⁵ John Selden, "Mare Clausum, The Right and Dominion of the Sea in two books, written at first in Latin by that late Famous and Learned Antiquary, John Selden, Esquire; formerly translated into English, and now perfected and restored by J. H. Gent, London, 1663."

¹⁶ Hautefeuille, *Histoire des origines, des progrès et des variations du Droit Maritime International* (1858), p. 14 *et seq.*; Bluntschli, *Le Droit International Codifié*, tr. by Lardy (1886), sec. 304; Calvo, *Le Droit International* (1896), Vol. I, pp. 25, 43, 471 *et seq.*; Perels, *Manuel de Droit Maritime International* (1884), p. 17 *et seq.*; Westlake, *International Law* (1904), Vol. I, p. 160 *et seq.*; Nys, *Le Droit International* (1905), Vol. II, p. 136; Chief Justice Cockburn in the case of *The Queen v. Keyn* (1876), L. R. 2 Exch. Div., p. 174.

along its shore front.¹⁷ Later another Dutch jurist, Cornelius van Bynkershoek, who won an international fame second only to that of his renowned predecessor, formulated more precisely the extent of territorial waters over which the sovereignty of nations controlling the adjoining shore could extend. Bynkershoek taught as a general maxim, *imperium terræ finiri, ubi finitur armorum potestas*,¹⁸ and applying that maxim to conditions in his own day, he laid down the limit of occupation over the sea by a state with an ocean coast line to be the range of a cannon, which was considered at that time to be three sea miles, of sixty miles to a degree of latitude. As he expresses it in an earlier work, *Dissertatione De Dominio Maris*, first published in 1702, Bynkershoek says:¹⁹

Accordingly, I should think that possession of an adjacent sea should be extended to that place up to which it can be considered as subject to the mainland; indeed, only to that point is it justly defended, even though it be not navigated upon continually, and to that point, is possession, sought by law, guarded; for there can be no question that one possesses continually who so possesses a thing that another is unable to possess it against his will. Wherefore, we do not concede dominion of an adjacent sea further than that distance from the land where it can be ruled.

* * * * *

Therefore, it evidently seems more just that the power of the land (over the sea) be extended to that point where missiles are exploded, for, indeed, up to that point we seem not only to rule it but to possess it. Moreover, I am speaking of these times, in which we use these machines: at other times, it had to be stated *generally*: that the power of the land (over the sea) is bounded where the strength of arms is bounded; for this, as we have said, guards possession.

Three miles as the extent of territorial waters seems to have been perhaps first adopted by a government when Thomas Jefferson, Secretary of State in the first administration of President Washington, wrote on November 8, 1793, to the British Minister at Phil-

¹⁷ Grotius, *De Jure Belli ac Pacis* (1853), Bk. II, ch. III, sec. 13.

¹⁸ Bynkershoek, "Jetti et Praesidis, *Quaestionum Juris Publici*, libri duo: quorum primus est De Rebus Bellicis, secundus De Rebus Varii Argumenti: Lugduni Batavorum, apud Joannem van Kerckhem, 1737," liber I, cap. VIII, folio 59. See also, Du Ponceau's translation of the first book of this work under the title, *A Treatise on the Law of War*, published at Philadelphia in 1810.

¹⁹ Bynkershoek, "*Opera Minora*; Lugduni Batavorum, 1730, *De Dominio Maris Dissertatione*," cap. II, pp. 363-364.

adelphia, Mr. Hammond, that the United States had decided upon the distance of a marine league as the territorial zone of their coastal waters. Since that time this limit has been approved and recognized by an ever-increasing number of jurists and publicists.²⁰ Thus among living British international jurists, Dr. Holland on this point, says:²¹

Most authorities would, I think, agree with Admiral de Horsey that the line between "territorial waters" and "the high seas" is drawn by international law, if drawn by it anywhere, at a distance of three miles from low-water-mark. In the first place the ridiculously wide claims made, on behalf of certain States, by mediæval jurists were cut down by Grotius to so much water as can be controlled from the land. The Grotian formula was then worked out by Bynkershoek with reference to the range of cannon; and, finally, this somewhat variable test was, before the end of the eighteenth century, as we may see from the judgments of Lord Stowell, superseded by the hard-and-fast rule of the three-mile limit, which has since received ample recognition in treaties, legislation, and judicial decisions.

* * * * *

The three-mile distance has, no doubt, become inadequate in consequence of the increased range of modern cannon, but no other can be substituted for it without express agreement of the Powers. One can hardly admit the view which has been maintained, *e. g.* by Professor de Martens, that the distance shifts automatically in accordance with improvements in artillery. The whole matter might well be included among the questions relating to the rights and duties of neutrals, for the consideration of which by a conference, to be called at an early date, a wish was recorded by the Hague Conference of 1899.

The three-mile limit was consecrated by the United States and Great Britain in the first article of the treaty they concluded at London in 1818. That limit was affirmed in other treaties, and by various nations in legislative acts, as for example in the *Territorial waters jurisdiction act* of August 16, 1878, of Great Britain,²² until

²⁰ Taylor, *A Treatise of International Public Law* (1901), pp. 293, 294; Westlake, *International Law* (1904), Vol. I, pp. 184, 185; Holland, *Letters to the Times; War and Neutrality* (1909), p. 132; Hershey, *International Law and Diplomacy of the Russo-Japanese War* (1906), pp. 132-133; Wilson, *International Law* (1910), p. 98; Baty, *Law Magazine and Review* (1910), p. 463.

²¹ Holland, *Letters to "The Times" upon War and Neutrality* (1881-1909), (1909), p. 132.

²² Barclay, *Problems of International Practice and Diplomacy* (1907), p. 357.

it became very generally recognized. There are still exceptions, however: Norway and Spain both claim that their jurisdiction extends beyond the traditional three-mile limit, the former to four miles, and the latter to six.²³ Against this claim of Spain, the Government of Great Britain in 1894 protested.²⁴

International juriconsults and publicists applied the rule of Bynkershoek in estimating the extent of the sovereignty of nations over the sea; and the test, whether waters of a bay were territorial or part of the open sea, came to be whether the entrance to a bay could be defended from the opposite shores.

Thus the celebrated Swiss jurist, Emer de Vattel wrote in 1758:²⁵

All we have said of the parts of the sea near the coast may be said more particularly, and with much greater reason, of the roads, bays, and straits, as still more capable of being occupied and of greater importance to the safety of the country. But I speak of the bays and straits of small extent; and not of those great parts of the sea to which these names are sometimes given, as Hudson's Bay and the Straits of Magellan, over which the empire cannot extend, and still less a right of property. A bay whose entrance may be defended may be possessed and rendered subject to the laws of the sovereign, and it is of importance that it should be so, since the country may be much more easily insulted in such a place than on the coast open to the winds and the impetuosity of the waves.

Not only did Vattel say that in order that a bay may come within the rule of a *mare clausum* its entrance must be so narrow as to be controlled from the adjoining shores, thereby exempting Hudson Bay from the category of a *mare clausum* since its entrance is so wide that from the adjoining shores its entrance cannot be controlled, but also Vattel expressly names Hudson Bay as being a part of the open sea.

Coming down from the middle of the eighteenth century when Vattel gave the above cited opinion as to Hudson Bay being a part of the high seas, to more recent times, the extent of territorial waters

²³ Barclay, *Annuaire de l'Institut de Droit International*, Vol. XII (1892-94), p. 125; Kleen, *ibid.*, p. 140.

²⁴ Lord Derby to Mr. R. G. Watson, Sept. 25, 1894. *Ex. Doc.*, 1875-76, Washington, Government Printing Office (1876), p. 641.

²⁵ Vattel, *Le Droit des Gens ou Principes de la loi naturelle* (1775), Vol. I, p. 142.

was gradually fixed at the distance of a cannon shot from shore, and in the early part of the nineteenth century the distance of this cannon shot was translated into one marine league or three miles. Applying this three-mile test of the limit of the zone of territorial waters to bays, we find that, as a corollary to it, there arose the rule of international law, that where the three-mile zone from each shore of the bay first meet and form a line six miles across from shore to shore, that that line of six miles should be taken as the base from which the three-mile zone should be measured seaward, and that the sovereignty of the state did not extend beyond that three-mile limit; while all the expanse of the bay inside of that six-mile line, no matter how wide the bay further within might become, should belong to the encircling nation, since the entrance was effectually occupied where the shores were not more than six miles apart. But the center of bays whose entrance was wider than six miles, with some historic exceptions, form part of the open sea.

In support of this rule that is now pretty generally acknowledged as forming one of the well-established rules of the law of nations, the opinions of many publicists and formal treaties between two or more nations can be cited. Thus the French publicist Theodore Ortolan in his work *Diplomatie de la Mer*, published in the middle of the nineteenth century, says:²⁶

One must place upon the same plane as roadsteads and harbors, gulfs and bays, and all indentations formed by the land of one State, which do not exceed in width double the carrying power of cannon, or when the entrance of such indentations can be controlled by artillery, or is defended naturally by islands, sandbars, or rocks. In all these instances, as a matter of fact, it is accurate to say that these gulfs or bays are within the dominion of the State master of the territory which encompasses them. That State possesses them: all the reasonings that we have made in regard to roadsteads and harbors can be repeated here.

Another great French authority on maritime law, Hautefeuille, in speaking of closed seas, says:²⁷

²⁶ Ortolan, *Diplomatie de la Mer* (1856), Vol. I, p. 157.

²⁷ Hautefeuille, *Des Droits et des Devoirs des Nations Neutres en temps de Guerre Maritime* (1868), 3d ed., Vol. I, p. 60.

It is indispensable to establish exactly the meaning of these words: *closed sea*, or *inland sea*, in order to avoid the mistakes and contradictions into which several justly celebrated publicists fell, when they studied this question. I understand by closed seas the gulfs and portions of the sea which do not communicate with the ocean except by a narrow enough strait in order to be considered, according to the principles explained in the preceding section, as forming a portion of the maritime domain of the State master of the shores; in such a way that it is impossible to penetrate into that gulf or that sea without crossing the territorial sea of that State, without facing its power and coming within the range of its artillery. It is necessary in addition that all the coasts of the sea should be subject to the nation mistress of the strait. A union of these two conditions is indispensable to give to a portion of the ocean the quality of an interior sea, of a closed sea, in order to place it under the exclusive dominion of a people. When such a union occurs, the gulf, the portion of the sea under discussion, however large its extent, is essentially territorial, and subject to one people, sovereign of its shores. This definition reduces very much the number of closed seas, but I believe it is the only one that conforms with the principles of the primitive law of nations: and the secondary law has allowed no exceptions, has sanctioned no interpretation of this rule, which has been recognized by the European Nations.

Then Hautefeuille immediately says: "According to primitive law, the sea is essentially free, and cannot become the appendix of a single people." After that, applying the rules of international law to *interior seas*, he continues:

In fact, if the strait is so large that the nation, mistress even of the two shores, cannot legitimately and really hold it under its dominion; if it is possible to cross it freely without violating the authority of the sovereign; if finally this prince has not the legitimate power to prevent the passage, it is evident that the sea is not closed. This portion of the ocean, more enclosed doubtless than the others, remains nevertheless in the condition of the ocean itself, free of all shackles. In that case, the three principal bases of the exception created in favor of territorial seas, real and continuous possession, the danger to the liberty of navigation, and the legitimate power to prevent it, are wanting. To wish to close such a passage to other nations would be to deprive them, in reality, of the right that they have to use the sea for navigation and even for fishing, and consequently to strike at the liberty of the sea.

In addition, he says, that in case two or more nations possess lands bordering on a bay or sea, in every such case, the bay or sea is open freely to the vessels of all countries, even though the entrance from

the ocean to the bay or sea is enclosed entirely by the territory of a single Power, and is of such a narrow width that one nation can effectually control the entrance.

The principle that such a bay or sea is as open as any part of the high seas is approved by the leading modern jurists and acknowledged in practice by the nations. Thus the Russian, de Martens;²⁸ the Italian, Fiore;²⁹ the Frenchman, Latour;³⁰ the Portuguese, Testa;³¹ the Americans, Wheaton,³² Halleck,³³ Woolsey³⁴ and Taylor;³⁵ the Swiss, Rivier;³⁶ the Belgian, Nys;³⁷ the Britons, Oppenheim³⁸ and Baker;³⁹ and the Hollander, de Louter;⁴⁰ cite the Black Sea as an example of a closed sea when it was entirely surrounded by Turkish territory, but which, even though the entrances through the Bosphorus and the Dardanelles were so narrow as to be within the control of the Turkish Empire, became an open sea when first Russia and subsequently Roumania acquired some of the land enclosing its waters. This right of free navigation into the Black Sea was recognized by several treaties, and finally confirmed in the Treaty of Paris of 1856. That treaty declared the Black Sea "open to the merchant marine of all nations," and further added that the commerce of that sea, "free from all restraint, would be subject only to health, customs and police regulations, conceived in a spirit favorable to the development of commercial transactions."

²⁸ De Martens, *Traité de Droit International* (1883), Vol. I, pp. 494-495.

²⁹ Fiore, *Nouveau Droit International Public* (1885), Vol. II, pp. 93-94.

³⁰ Latour, *La Mer Territoriale* (1889), p. 56.

³¹ Testa, *Le Droit Public International Maritime* (1886), p. 70.

³² Wheaton, *Elements of International Law*, 6th ed., by W. B. Lawrence (1855), p. 241.

³³ Halleck, *International Law*, 4th ed., by Baker (1908), Vol. I, p. 180.

³⁴ Woolsey, *International Law* (1888), p. 80.

³⁵ Taylor, *A Treatise of International Public Law* (1901), p. 291.

³⁶ Rivier, *Principes du Droit des Gens* (1896), Vol. I, p. 154.

³⁷ Nys, *Le Droit International; les principes, les theories, les faits* (1904), Vol. I, p. 448.

³⁸ Oppenheim, *International Law* (1905), Vol. I, p. 307.

³⁹ Sir G. Sherston Baker, as editor of the fourth edition of General Halleck's *International Law*, revised the American author's text so as to bring it down to date, and consequently the views on the law of nations expressed in that edition have the sanction of the learned British editor.

⁴⁰ J. de Louter, *Het Stellig Volkenrecht* (1910), Vol. I, p. 386.

The German publicist, Dr. Bluntschli, in defining the extent of territorial waters, expressly cites Hudson Bay as a part of the open sea. He says: "Thus Hudson Bay and the Gulf of Mexico evidently form part of the open sea."⁴¹

Another Continental jurisconsult of world-wide reputation who specifically mentioned Hudson Bay as being an open sea is the late Dr. Fedor de Martens of St. Petersburg. "But one can not," he says, "recognize as territorial seas either the Gulf of Mexico or Hudson Bay or what are called King's (or Queen's) Chambers."⁴²

So too, the Hollander, Professor de Louter of Utrecht, in his recent work, *Het Stellig Volkenrecht*, in treating of the freedom of the seas, mentions Hudson Bay as now being free. He says:

In former centuries especially the so-called proprietorship or sovereign-rights were applied to the large gulfs of Bothnia, Biscay, Mexico, and Hudson.

Then immediately in a foot-note he adds:

The same applies in reference to the Kara Sea which also may no longer be considered as Russian territory. v. Martens I: 376 nevertheless classes the Gulf of Finland among the Russian territorial waters. *ib.* 383; *quo jure?* one may ask.⁴³

Dr. Oppenheim,⁴⁴ now teaching the law of nations at Cambridge University, cites as forming part of the open sea, in addition to the Black Sea and the Sea of Mamora, the Irish and the Baltic Seas, the Gulfs of Bothnia and Finland, the Kara and the White Seas, Bering Sea, Baffin's Bay and many other large bodies of water. As examples of territorial bays in Europe, he gives the Frische and Kurische Haffs and the Bay of Stettin as belonging to Germany, and the Zuyder Zee as part of Holland.

The German jurisconsult, Perels, legal adviser to the German Imperial Admiralty at Berlin, thus defines in what cases a *bay* may be

⁴¹ Bluntschli, *Le Droit International Codifié*, tr. by Lardy (1886), sec. 309.

⁴² F. de Martens, *Traité de Droit International* (1883), Vol. I, p. 504.

⁴³ J. de Louter, *Het Stellig Volkenrecht* (1910), p. 386. The reference that de Louter makes to Martens will be found in the first volume of the French edition of the latter's work at pp. 495 and 503.

⁴⁴ Oppenheim, *International Law* (1904), Vol. I, pp. 247, 306-307.

considered as appertaining to the high seas and when it falls within the territorial waters of the nation controlling the adjoining land. He says:⁴⁵

A sea or a gulf communicating with the ocean by one or several straits cannot be recognized as an appropriated sea except in the cases where all the shores belong to the State, which is also master of the strait giving access to the sea or gulf, provided this passage is sufficiently narrow to be commanded by cannons placed upon the two shores.

The above quotation from the German juriconsult, if applied to the status of Hudson Bay, clearly upholds Vattel, and others in proclaiming that that great body of water forms a part of the high seas. So, too, the following passage from the French-speaking Swiss publicist, Alphonse Rivier, in which he defines what bays form part of the high seas, and what bays are closed seas, equally supports the contention that Hudson Bay is a part of the open sea. Rivier, who for many years was Consul-General of the Swiss Confederation at the Belgium capital, and taught the law of nations in the University of Brussels, says:⁴⁶

Every sea to which there is access from the ocean forms part of the open sea. It is only otherwise if it is surrounded by the territory of a single State, master of the entrance, dominating the strait by means of its batteries, and having thus the power to close it effectively at will. In such a case, the sea belongs to that State; it is a closed sea, *mare clausum*, territorial, interior *sensu lato*. If there are several riparian States, freedom prevails; the sea does not belong to the various riparians *pro rata* regions, it is free.

A little further on, Rivier says specifically of gulfs and bays:⁴⁷

In accordance with what has just been said, the portions of the sea, or seas, which by reason of their configuration are called gulfs, or bays, are territorial when they are enclosed by the lands of a single State and when their entrance is sufficiently narrow to be commanded by the cannons on the shore. But the moment that there are several riparian States, the gulf is a free sea, no matter what may be the width of its entrance. A gulf, enclosed even by a single State, is a free sea, if the entrance is too wide to be dominated from the shore. It is generally

⁴⁵ Perels, *Manuel de Droit Maritime International* (1884), p. 36.

⁴⁶ Rivier, *Principes de Droit des Gens* (1896), Vol. I, p. 153.

⁴⁷ Rivier, *ibid.*, p. 154.

admitted that such is the case when the separation between the two banks is more than ten marine miles.

* * * * *

The word gulf is here used in a broad sense, including bays, roadsteads, etc. A gulf is a part of the sea which advances into the lands, and whose opening on the side towards the sea is generally large, so as to give it upon a map the shape of a woman's breast (*κόλπος, κόλφος*), from whence comes its name. A bay, according to Littre, is a small gulf, whose entrance is narrow; there are, however, some very large bays.

Besides, Rivier specifically says that Hudson Bay forms part of the open sea.⁴⁸ In addition, this Swiss-Belgian jurist is of the opinion that Bering Sea and Delaware Bay and the Gulfs of Bothnia and Finland form part of the open sea.

Finally, the Institute of International Law, which includes in its membership jurists from the leading political and intellectual nations of the world, in its session of March, 1894, held at Paris, voted the following resolutions about the territorial sea:

Article 2. Territorial waters extend for six miles (60 to one degree of latitude) from low-water mark along the whole extent of its coasts.

Article 3. For bays, territorial waters follow the trend of the coast, except that they are measured from a straight line drawn across the bay from the two points nearest the sea where the opening of the bay is of twelve marine miles in width, unless a greater width shall have become recognized by an immemorial usage.⁴⁹

The above articles were adopted by a large majority, led by (now Sir) Thomas Barclay, an English barrister, practicing at the Paris bar. And twelve miles were fixed upon instead of ten in the latter of these two articles, because, as M. Edouard Rolin of Brussels

⁴⁸ Rivier, *ibid.*, p. 155.

⁴⁹ Barclay, *Problems of International Practice and Diplomacy* (1907), p. 112.

The original French text of these two articles is here given:—

"Article 2.—La mer territoriale s'étend à six milles marins (60 au degré de latitude) de la laisse de basse marée sur toute l'étendue des côtes.

"Article 3.—Pour les baies, la mer territoriale suit les sinuosités de la côte, sauf qu'elle est mesurée à partir d'une ligne droite tirée en travers de la baie dans la partie la plus rapprochée de l'ouverture vers la mer, où l'écart entre les deux côtes de la baie est de douze milles marins de largeur, à moins qu'un usage continu et séculaire n'ait consacré une largeur plus grande."

Annuaire de l'Institut de Droit International, Vol. XIII (1894), p. 329: "Définition et régime de la mer territorial, Rapporteur, M. Barclay."

argued, "it is double the six miles provided for the territorial sea, and by that very fact, it fits better in the logical development of the project."⁵⁰ The above expressed wish of the Institute to have the marginal zone doubled in extent is not binding on nations: nevertheless, for the sake of argument, *suppose* it were the law between nations, it would make of Hudson Bay an open and not a closed sea, since the entrance to that large bay or sea is at all places much more than twelve miles wide. The words of the Institute, the "territorial waters follow the trend of the coast" when applied to Hudson Bay, make it an open sea as at no point do the various bodies of water leading to that inland sea narrow down to twelve miles. But actually three miles is generally recognized as the extent of marginal waters and in deciding whether the waters or bays are in their whole extent territorial or not, the test is whether the distance across their mouths is six miles or less.

In addition to the foregoing facts, two treaties to both of which Great Britain was a party, uphold the status of Hudson Bay as a part of the open sea. In a convention concluded between Great Britain and France, August 2, 1839, to regulate the rights of fishery of their respective subjects in the Anglo-French waters, the three-mile limit was recognized as in force between the two Powers. "The subjects of His Majesty, the King of the French," it was said, "shall enjoy the exclusive right to fish within the radius of three miles from low water mark, along the whole of the coast of France, and the subjects of Her Britannic Majesty shall enjoy the exclusive right to fish within a radius of three miles from low water mark, along the whole of the coast of the British Islands." It was also agreed by the two nations on that occasion that the zone of three miles that fixed the extent of the exclusive right to fish along the coasts of the two Powers should be measured, in the case of bays whose opening toward the ocean did not exceed ten miles, from a straight line drawn from promontory to promontory. Finally, it was agreed that the miles mentioned were of sixty to a degree of latitude.

⁵⁰ *Annuaire, ibid.*, p. 292. The words are cited as reported by Sir Thomas Barclay, not as spoken by M. Rolin.

On May 6, 1882, Great Britain, Germany, France, Belgium, Holland and Denmark signed a convention to regulate the fishery in the North Sea outside of the territorial waters. By the second article of that convention, it is recognized that the fishermen of any one of the contracting nations enjoy the exclusive right to take fish within a distance of three miles of the shores of that nation at low water. "For bays," the same article says, "the radius of three miles shall be measured from a straight line, drawn across the bay, at the nearest point to the entrance, at the first point where the opening does not exceed ten miles." Thus we see that the three-mile zone was formally recognized and confirmed on these two occasions, twice by Great Britain and France, and once by Germany, Belgium, Holland and Denmark. On both occasions it was agreed to by the contracting Powers, that the waters of all bays whose entrance from the open sea was ten miles or less in width should be considered to be entirely within the territorial zone, thus increasing the six miles test at the entrance of bays or gulfs by four miles, almost doubling the distance across from shore to shore. Nevertheless, if the case of Hudson Bay is tested by those two treaties to which Great Britain was a party with five other maritime Powers it will be found that Hudson Bay is not a closed sea, but on the contrary the zone of territorial waters must follow the contour of its shores since the entrance of Hudson Bay through Hudson Strait is not only at all points more than ten miles wide, but in fact twenty or more miles across from shore to shore.

The law of nations as interpreted by the above mentioned European continental publicists, the Institute of International Law, and two treaties to each of which Great Britain was a party, supports the contention that Hudson Bay is a part of the open sea. Let us next examine, first American and then British opinions upon the extent of the territorial sea in the case of embayed waters.

The American publicist, James Kent, writing at the end of the first quarter of the nineteenth century, in commenting on the extent of territorial waters, urged, in his well known treatise, *Commentaries on American Law*, that the extent of the territorial waters over which the sovereignty of the United States extended according to the then

existing law of nations, should be enlarged. He said on this point:⁵¹

Considering the great extent of the line of the American coasts, we have a right to claim for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi. It is certain that our government would be disposed to view with some uneasiness and sensibility, in the case of war between other maritime powers, the use of the waters of our coast, far beyond the reach of cannon shot, as cruising ground for belligerent purposes. In 1793, our government thought they were entitled, in reason, to as broad a margin of protected navigation, as any nation whatever, though at that time they did not positively insist beyond the distance of a marine league from the sea shores; and, in 1806, our government thought it would not be unreasonable, considering the extent of the United States, the shoalness of their coast, and the natural indication furnished by the well-defined path of the Gulf Stream, to expect an immunity from belligerent warfare, for the space between that limit and the American shore. At least it ought to be insisted, that the extent of the neutral immunity should correspond with the claims maintained by Great Britain around her own territory, and that no belligerent right should be exercised within "the chambers formed by headlands, or anywhere at sea within the distance of four leagues, or from a right line from one headland to another."

That Kent well knew that this opinion of what the American Government might claim was not sanctioned by the existing law of nations is shown by the paragraph immediately preceding.⁵² After citing the decision of Sir William Scott in the case of the *Twee Gebroeders*, and showing that the United States had resisted successfully the claims of Russia to exclusive jurisdiction over part of the north Pacific Ocean and also Behring Sea, Kent went on to say that it "is difficult to draw any precise or determinate conclusion, amidst the variety of opinions," as to the extent of exclusive sovereignty of nations over the adjoining sea. However, he precised his opinion as to the extent of the law at the time he wrote in these words:⁵³

⁵¹ Kent, *Commentaries on American Law* (1826), Vol. I, p. 29.

⁵² Kent, *ibid.*, pp. 28-29.

⁵³ Kent, *ibid.*, p. 29.

According to the current of modern authority, the general territorial jurisdiction extends into the sea as far as cannon shot will reach, and no farther, and this is usually calculated to be a marine league; and the Congress of the United States have recognized this limitation, by authorizing the District Courts to take cognizance of all captures made within a marine league of the American shores.

Kent thus shows that he recognized that at the time he wrote the three-mile limit was the full extent of territorial waters.

President Woolsey of Yale University, in commenting on Kent's suggestion of extending the territorial sovereignty of America over the adjoining sea, said that such broad claims were not consistent "for a nation that has ever asserted the freedom of doubtful waters, as well as contrary to the spirit of the more recent times."⁵⁴ In addition, the United States made neither at the time Kent wrote nor at any time since, any claim for such a broad extension of their territorial waters, even "for fiscal and defensive purposes." Whatever opinion Kent may have entertained or formulated as to what might be claimed, the American Government has never given its sanction to that opinion by adopting it as its own.⁵⁵

In 1877, in the Halifax Fisheries question, the United States agent, Judge Dwight B. Foster, said that the territorial waters of a nation extended only three miles from its shore at low tide, and that in the case of bays that were more than six miles across from headland to headland, the same rule applied.

Of other American jurists who have written on the law of nations, Pomeroy⁵⁶ says Hudson Bay is an open sea, while on the contrary General Davis maintains it is closed.⁵⁷

In describing the extent of territorial waters as prescribed by the law of nations, the highest judicial American tribunal, the Supreme Court of the United States, in the case of *Manchester v. Massachusetts*, Justice Blatchford delivering the opinion of the court, held that, as between nations, it is a rule of law that bays entirely within

⁵⁴ Woolsey, *International Law* (1888), 5th ed., p. 78.

⁵⁵ *North Atlantic Coast Fisheries Arbitration: Argument of the United States* (1910), p. 219.

⁵⁶ Pomeroy, *International Law*, edited by T. S. Woolsey (1886), p. 176.

⁵⁷ Davis, *Elements of International Law* (1908), p. 58.

the territory of a single nation, and whose mouths where the bays join the high sea are two marine leagues or less across from shore to shore, come within the territorial jurisdiction of that Power.⁵⁸ The nation in the case of such bays has the right to control the fisheries, whether "the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or embedded in the soil." In the case before it, the court did not have to pronounce on the question of so-called historic bays.

Naturally the same rule of international law by which Hudson Bay is found to be an open sea makes of Delaware and Chesapeake Bays — except on the "historic" bay theory — part of the high seas, since the entrances to both those bodies of water are more than six miles wide. This is the opinion held by Rivier;⁵⁹ and latterly Mr. Baty,⁶⁰ in commenting on the American-British north Atlantic coast fisheries question, has also expressed the opinion that according to the contention of the United States in that case, Delaware Bay, as well as Chesapeake Bay, excepting the marginal zone, are part of the open sea.

As has already been stated above, however, there are some bays wider, often much more so, than six miles across from shore to shore, that are deemed by some publicists to form in their whole extent part of the territorial waters of the nation occupying the adjoining land; such bays are consequently, it is often urged, withdrawn from the area of the open sea. These possible exceptions to the general rule of law governing what bays are territorial in their entirety, and what are not, are based on the fact that the claim to the exclusive sovereignty over such bays made by the nation possessed of the neighboring or enclosing land, has been asserted from *time immemorial* without protest from other states.

In the past, in Delaware and Chesapeake Bays, both of whose entrances from the open sea are more than six miles across, the American Government exercised its authority first in Delaware Bay, outside of the three-mile zone of territorial waters, and later in a case

⁵⁸ 139 U. S. (1890), p. 258.

⁵⁹ Rivier, *Principes du Droit des Gens* (1896), Vol. I, p. 155.

⁶⁰ Baty, *The Law Magazine and Review* (1910), p. 464.

involving the legal status of the waters of Chesapeake Bay, an American court decided that all the waters of that bay were territorial in character. An examination of these two cases will show that the territorial character claimed for those two bays is due to exceptions to the general rule applicable to embayed waters.

The first of these cases, that affecting the status of Delaware Bay, arose in 1793, when the American Republic was trying to maintain a neutral attitude in the war then in progress between Great Britain and France. On the first of February, 1793, the French Republic declared war against Great Britain, Holland and Spain.⁶¹ With the purpose of guarding the young American nation against needless entanglement in that struggle, President Washington issued, on April 22d, a proclamation declaring the neutrality of the United States and warning American citizens not to give aid to either side in contravention of that proclamation and the laws of nations.⁶²

Both France and Great Britain, however, in order to bring the war to a victorious close for itself respectively, sought, among other means, in their efforts to cripple each other's power, to strike at one another's resources through the young American Republic. France, the weaker Power on the ocean, tried to accomplish this object by waging war upon Great Britain from the territory of the United States as a base of operation; and Great Britain, the stronger nation at sea, sought the same end by preventing American citizens from carrying on neutral commerce in food with France.

When M. Genêt, the new Minister of France to America, landed, April 8, 1793, at Charleston, South Carolina, he proceeded at once to arm and commission several vessels and send them to sea to prey upon the maritime commerce of Great Britain. Genêt also instructed the French consuls in America to act as courts of admiralty. The French war vessel, *l'Ambuscade*, which had brought Minister Genêt across the Atlantic, captured the British merchant vessel,

⁶¹ Browning, *Foreign Policy of Pitt to the outbreak of war with France*, Cambridge Modern History (1904), Vol. VIII, p. 305.

⁶² *American State Papers, Foreign Relations* (1833), Vol. I, p. 140; McMaster, *The Struggle for Commercial Independence (1783-1812)*, Cambridge Modern History (1903), Vol. VII, p. 318.

Grange, in Delaware Bay, and sent her to Philadelphia as a prize.⁶³ Two other prizes, taken by one of the cruisers commissioned by Genêt at Charleston, arrived at Philadelphia. All this, the newly arrived Minister of France did "before Mr. Genêt had presented himself or his credentials to the President, before he was received by him, without his consent or consultation, and directly in contravention of the state of peace existing, and declared to exist, in the President's proclamation, and incumbent on him to preserve till the constitutional authority should otherwise declare."⁶⁴ The American Secretary of State, Thomas Jefferson, received from the British Minister at Philadelphia, Mr. Hammond, several letters complaining of Genêt's acts and demanding, among other things, the restitution of the *Grange*.⁶⁵ President Washington called his Cabinet together, and it decided that the commissions granted to privateers by Genêt, as also the condemnation of prizes by the consuls of France, were void. In reference to the case of the *Grange*, Attorney-General Randolph communicated an elaborate opinion in reference to the status of Delaware Bay.⁶⁶ The question whether the French war vessel *l'Ambuscade* had made a good prize in capturing the *Grange* turned on the point whether the seizure had been made in the territorial waters of the United States or in a part of the high seas; and after citing many learned authorities, Attorney-General Randolph came to the conclusion that all of the waters of Delaware Bay within Capes May and Henlopen were neutral, and so the seizure of the *Grange* was illegal. The American Cabinet, following the advice of its legal adviser, decided that the *Grange* should be returned to her British owners.

The second case, which involved a consideration of whether the waters of Chesapeake Bay were in their entirety territorial or not, was passed upon in 1885 by the court of commissioners of the Alabama Claims.⁶⁷ In October, 1862, during the American Civil War, the American vessel *Alleganean* was seized by a Confederate naval

⁶³ McMaster, *History of the People of the United States* (1888), Vol. II, p. 99.

⁶⁴ *American State Papers, Foreign Relations* (1833), p. 160.

⁶⁵ *Ibid.*, p. 147.

⁶⁶ *Ibid.*, p. 148.

⁶⁷ *Albany Law Journal* (1886), p. 484; Scott, *Cases on International Law* (1902), p. 143.

force while she lay at anchor in Chesapeake Bay, more than four miles from land. Interpreting an act of the United States of June 5, 1882, and applying it to the case at bar, the court held that Chesapeake Bay, whose entrance is twelve miles wide, was entirely within the territorial jurisdiction of the United States.

While these two decisions at first blush seem to support the theory that Hudson Bay can be considered to be a closed sea, yet upon careful examination several things are apparent that differentiate those decisions concerning the status of Delaware and Chesapeake Bays respectively from the case of Hudson Bay. First, both cases arose in times of war, involving the protection by the American Government of neutral commerce; especially was this true in the case of the *Grange* in 1793. The United States were at that time most anxious to remain neutral, and the policy of neutral duties then evolved under most trying circumstances by Secretary Jefferson, received later the praises of the British statesman, George Canning, and in our own day those of the British jurists, Messrs. Hall⁶⁸ and Westlake.⁶⁹ The policy pursued by Jefferson in that time of war was an advance in the slow development of the law of nations, from the time of Gentilis and his predecessors, toward limiting the area of belligerent operations more and more to the territory of the actually belligerent nations and the expanse of the high seas. It was at the urgent demand of Great Britain that the Cabinet decided to restore the *Grange* to her British owners, and that decision, based upon the theory that Delaware Bay was a territorial bay, was arrived at under the influence of Great Britain's demand that the *Grange* had been seized in violation of the neutrality of the United States. Consequently, the American Government, which was anxious to maintain peace with the motherland, was in a sense compelled by the British demand to declare Delaware Bay a territorial bay. Thus, Great Britain by this request for the restitution of the *Grange*, openly approved the declaration of the American Government that Delaware Bay is territorial in character. But the American Government has not recognized, openly or tacitly, Hudson Bay as being a closed sea. Surely, the British Em-

⁶⁸ Hall, *A Treatise on International Law* (1884), p. 550

⁶⁹ Westlake, *International Law* (1904), Vol. II, p. 175.

pire cannot cite the case of the territorial character of Delaware Bay as an example in support of the proposition that Hudson Bay is a closed sea. For Delaware Bay became a territorial bay of the United States because Great Britain compelled the American Republic to claim that its jurisdiction extended, and to actually enforce that claim to all the waters of Delaware Bay in order to save the British merchant ship *Grange* — after her capture by the French war vessel *l'Ambuscade*, within the Delaware capes, but at a greater distance than three miles from the nearest land — from being declared a good prize.

In the case of Chesapeake Bay, that bay — as well as Delaware Bay — is much smaller than Hudson Bay, the latter being in truth a large sea, like the Black Sea or the Baltic Sea. In addition there is also this difference between Chesapeake Bay and Hudson Bay: since a very long time — probably never since the United States declared their independence in 1776 — foreign fishermen have not fished in the waters of Chesapeake Bay, while on the contrary American whalers for many years have hunted, and still hunt, whales in the waters of Hudson Bay.

As has already been pointed out, formerly England, like other nations, made great claims to dominion over the seas about her. She was compelled, however, as other Powers were by the same force of necessity that made them renounce much of their pretensions to dominion over the sea, to give up the major part of hers. And as regards Great Britain's claims to dominion over the more immediate portions of the sea, such as the Irish Channel and bays along her coast, she has likewise, like other nations, gradually become more modest in her claims.

In the second half of the nineteenth century one of the most celebrated of British international publicists, Sir Robert Phillimore, who for many years was a legal adviser of the British Crown, in his monumental treatise, *International Law*, in speaking of the extent of territorial waters, says:⁷⁰

Though the open sea be thus incapable of being subject to the rights of property, or jurisdiction, yet reason, practice, and authority have

⁷⁰ Phillimore, *International Law* (1879), Vol. I, p. 274.

firmly settled that a different rule is applicable to *certain portions* of the sea.

And first with respect to that portion of the sea which washes the coast of an independent State. Various claims have been made, and various opinions pronounced, at different epochs of history, as to the extent to which territorial property and jurisdiction may be extended. But the rule of law may be now considered as fairly established — namely, that this absolute property and jurisdiction does not extend, unless by the specific provisions of a Treaty or an unquestioned usage, beyond a marine league (being three miles), or the distance of a cannon shot, from the shore at low tide: — “quousque e terra imperari potest” — “quousque tormenta exploduntur” — “terræ dominium finitur ubi finitur armorum vis” — is the language of Bynkershoek. “In the sea, out of the reach of cannon shot” (says Lord Stowell), “universal use is presumed.” This is the limit fixed to absolute property and jurisdiction; but the rights of independence and self-preservation in times of peace have been judicially considered to justify a nation in preventing her revenue laws from being evaded by foreigners beyond this exact limit; and both Great Britain and the United States of North America have provided by their municipal law against frauds being practiced on their revenues, by prohibiting foreign goods to be transhipped within the distance of four leagues of the coast, and have exercised a jurisdiction for this purpose in time of peace. These were called the Hovering Acts.

Again further on, Phillimore says of gulfs and other estuaries of the sea: ⁷¹

Besides the rights of property and jurisdiction within the limit of cannon shot from the shore, there are certain portions of the sea which, though they exceed this verge, may, under special circumstances, be prescribed for. Maritime territorial rights extend, as a general rule, over arms of the sea, bays, gulfs, estuaries which are enclosed, but not entirely surrounded by lands belonging to one and the same State. With respect to bays and gulfs so enclosed, there seems to be no reason or authority for a limitation suggested by Martens, “Surtout en tant que ceux-ci ne passent pas la largeur ordinaire des rivières, ou la double portée du canon” — or for the limitation of Grotius which is of the vaguest character — “mare occupari potuisse ab eo qui terras ad latus utrumque possideat, etiamsi aut supra pateat ut sinus, aut supra et infra ut fretum, dummodo non ita magna sit pars maris ut non cum terris comparata portio earum videri possit.” The real question, as Gunther truly remarks, is, whether it be within the physical competence of the nation, possessing the circumjacent lands, to exclude other nations from the whole portion of the sea so surrounded: or, as Martens declares in his

⁷¹ Phillimore, *ibid.*, p. 284.

earliest, and in some respects best, treatise on International Law, "*Partes maris territorio ita natura vel arte incluse ut exteri aditu impediri possint, gentis ejus sunt, cujus est territorium circumjacens.*" To the same effect is the language of Vattel: "Tout ce que nous avons dit des parties de la mer voisines des côtes, se dit plus particulièrement et à plus forte raison, des rades, des baies et des détroits, comme plus capables encore d'être occupés, et plus importants à la sûreté du pays. Mais je parle des baies et détroits de peu d'étendue, et non de ces grands espaces de mer auxquels on donne quelquefois ces noms, tels que la baie de *Hudson*, le détroit de *Magellan*, sur lesquels l'empire ne saurait s'étendre, et moins encore la propriété. Une baie dont on peut défendre l'entrée, peut être occupée et soumise aux lois du souverain; il importe qu'elle le soit, puisque le pays pourrait être beaucoup plus aisément insulté en cet endroit que sur des côtes ouvertes aux vents et à l'impétuosité des flots."

Thus this notable British expert on the law of nations, when in his own treatise, *International Law*, he treats of the extent of the territorial sea, cites approvingly that passage of Vattel in which that Swiss jurist, in discussing how far embayed waters are territorial, specifically says that Hudson Bay is an open sea. By approving Vattel's opinion that Hudson Bay is not a closed sea, the British jurisconsult, Phillimore, ranges himself as a supporter of the ancient freedom of the waters of Hudson Bay.

II.

The question of what are open and what are closed seas was raised between the United States of America and the British Empire in the cases of the Bay of Fundy and Bering Sea. Both disputes were submitted to international arbitration for settlement. An examination of these cases, first that of the Bay of Fundy and then that of Bering Sea, will throw light on the status of whether Hudson Bay is an open or a closed sea.

The question of the status of the Bay of Fundy as a part of the open sea or not, arose as a result of the divergence of opinion between the United States and the British North American Maritime Provinces over the correct interpretation of the first article of the American-British Treaty of 1818. The contention largely turned on the proper meaning of the word *bays* as used in that article. The British authorities sought to exclude American vessels from fishing

in the bays of Nova Scotia, no matter what their area might be, and justified their action upon the renunciation by the United States in the first article of the Treaty of 1818 "to take, dry, or cure fish on, or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's Dominions in America," outside of those of the shores of the Magdalen Islands, the coasts of Canada and Labrador east and north of Mount Joly, and a part of the shores of Newfoundland. Against this claim of the British authorities, the Government of the United States protested. American fishing vessels, however, were seized within the Bay of Fundy by the British authorities. Conscious that this attempt to enforce the rights of territorial jurisdiction to so large a body of water as the Bay of Fundy, which evidently formed a part of the open sea, was contrary to the principles of the law of nations, the British Government gave up in 1845 its claim of sovereign jurisdiction over the Bay of Fundy, but stated that it made that concession as to that one bay only.⁷² Gradually, however, as many claims and counter-claims were made by citizens and corporations of either country against the other, America and Great Britain agreed in the Convention of February 8, 1853, to refer all such claims to a mixed commission.⁷³ In every case where the commissioners could not agree, the convention provided that they should refer it to an umpire. In that way the claims arising from the seizure by the Canadian authorities in 1843 of the American fishing vessel *Washington*, while fishing in the Bay of Fundy, ten miles from shore, was referred for decision to an umpire, Mr. Joshua Bates.⁷⁴ He was an American by birth, but residing in England where he was a member of the banking house of Baring.

The umpire said that the question whether the seizure of the *Washington* was justified or not, depended on the word "bays" as used in the Treaty of 1783.⁷⁵ By the Treaty of 1818 the same rights

⁷² *Documents of the United States Senate*, Special Session called March 4, 1853, Senate Document 3, pp. 4-8, 9-21.

⁷³ *Treaties and Conventions concluded between the United States of America and other Powers since July 4, 1776* (1889), p. 445.

⁷⁴ *Senate Ex. Doc.*, No. 103, 34th Cong., 1st Sess., p. 184.

⁷⁵ *United States No. 1* (1893), *Bering Sea Arbitration, British Argument* (London), p. 145.

were granted to the Americans to cure fish on the coasts, bays, etc., of Newfoundland as they had before under the Treaty of 1783, on the shores of the Maritime Provinces. He continued,

But the Americans relinquished that right, *and the right to fish within three miles of the coasts, bays, etc., of Nova Scotia*. Taking it for granted that the framers of the treaty intended that the word "bay" or "bays" should have the same meaning in all cases, and no mention being made of headlands, there appears no doubt that the *Washington*, in fishing ten miles from the shore, violated no stipulations of the Treaty.

It was urged, on behalf of the British Government, that by "coasts," "bays," etc., is understood an imaginary line drawn along the coast from headland to headland, and that the jurisdiction of Her Majesty extends three marine miles outside of this line; thus closing all the bays on the coast or shore, and that great body of water called the Bay of Fundy, against Americans and others, making the latter a British bay. This doctrine of the headlands is new, and has received a proper limit in the convention between France and Great Britain of the 2d of August, 1839; in which "it is agreed that the distance of three miles, fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries, shall, with respect to bays the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland."

The Bay of Fundy is from 65 to 75 miles wide and 130 to 140 miles long; it has several bays on its coast; thus the word "bay," as applied to this great body of water, has the same meaning as that applied to the Bay of Biscay, the Bay of Bengal, over which no nation can have the right to assume sovereignty. One of the headlands of the Bay of Fundy is in the United States, and ships bound to Passamaquoddy must sail through a large space of it. The island of Grand Menan (British) and Little Menan (American) are situated nearly on a line from headland to headland. These islands, as represented in all geographies, are situated in the Atlantic Ocean. The conclusion is, therefore, in my mind irresistible that the Bay of Fundy is not a British bay, nor a bay within the meaning of the word as used in the treaties of 1783 and 1818.

The umpire, therefore, in deciding the case of the *Washington* in favor of the United States, based his judgment not only on the fact that the right of the Americans to fish in the Bay of Fundy was secured to them both by the meaning of the Treaty of 1783 and that of 1818, but also because the Bay of Fundy was of itself a part of the open sea, and consequently open to the fishermen of all nations.

In addition, when in 1909 the United States and Great Britain concluded a treaty referring the whole of the differences between

them over the North Atlantic Coast Fisheries to the Hague International Court, it was mutually agreed by an exchange of letters between Secretary Root and Ambassador Bryce, that neither the right of Americans to fish in the Bay of Fundy, nor the innocent passage through the Gut of Canso should be passed on by the International Court. It is true that in those letters it was stipulated that by that agreement of exclusion the rights of either party in either of those bodies of water should not be in any way prejudiced. Yet the very fact that the British Empire was willing to exclude the Bay of Fundy from the jurisdiction of the Hague Tribunal in that agreement to submit to that high court the settlement of the differences over the North Atlantic Fisheries, is a practical admission that the decision of Mr. Bates that the Bay of Fundy is a part of the high seas, and so an open and not a closed bay, is correct. It must be remembered that Mr. Bates' decision holds that the Bay of Fundy is an open sea, independently of the fact that one of the headlands belongs to the United States. This decision, if applied to Hudson Bay, shows that that latter body of water is also a part of the high seas, since to each bay entrance is obtained through a large mouth, many times double the width of the three miles zone of coastal waters.

Another case that supports the freedom of Hudson Bay, with the exception of the marginal belt of three miles of territorial waters following the contour of its shores, is the historic dispute between the United States, Great Britain and Russia as to whether Bering Sea was or was not a closed sea.⁷⁶ And the claims and arguments asserted by each illustrate well how all nations in the struggle for the freedom of the sea have argued in favor of whichever side of that question seemed at the time to favor their individual interests. All three Powers made claims of sovereignty to larger and larger areas of land in the northwest part of the American continent. Russia even went so far as to assert, in an ukase issued in 1821 by the Emperor Alexander I, her right of absolute dominion over Bering Sea and a large extent of the northern part of the Pacific Ocean,

⁷⁶ *United States, No. 1* (1893), *Bering Sea Arbitration, British Case* (London); Thomas Willing Balch, *The Alaska Frontier* (1903).

and also extended her territorial claims from the fifty-fifth degree of north latitude as claimed by the ukase of 1799 of the Emperor Paul down to the fifty-first degree. Against these claims of sovereignty on the part of the Muscovite Empire beyond the three-mile limit, both the American and the British Governments protested.⁷⁷ America and Russia arranged their points of difference by treaty on the 5/17 of April, 1824. That compact recognized the freedom of the Northern Pacific Ocean, and fixed the latitude of fifty-four degrees forty minutes north as the line that should divide the American and the Russian spheres of influence in North-West America.

The differences between Great Britain and Russia were not settled so easily, and not until a year later. Throughout all the negotiations, culminating in the Anglo-Russian treaty of 1825, Great Britain asserted constantly that Bering Sea as well as the northern Pacific Ocean must remain part of the open sea.⁷⁸

On September 27, 1822, George Canning, the British Foreign Secretary, wrote to the Duke of Wellington, then Premier of Great Britain, concerning the claims of the Russian Empire over the waters of Bering Sea and the extreme northern part of the Pacific Ocean.⁷⁹ With respect to the claims put forward by Russia in the Emperor Alexander's ukase in 1821, wherein the Muscovite sovereign proclaimed the extension of his sovereignty over the seas adjacent to the Russian possessions in America and Asia "to the unprecedented distance of one hundred miles" from the line of the Russian coast, thereby closing an unobstructed passage which was of importance for the promotion of general commerce and navigation, Secretary Canning said that such pretensions were, in the opinion of the best legal authorities, "positive innovations on the right of navigation." According to common usage, which he said had gained the force of law, "an accessorial boundary" had been added for a limited distance to the shores of a state in order to afford to that state sufficient protection, but in no way interfering with the rights of the subjects of the other nations to navigate and traffic freely. But the Muscovite

⁷⁷ *Ibid.*, British Case, pp. 5, 41, 42, 43.

⁷⁸ *Ibid.*; Balch, *ibid.*

⁷⁹ *Fur Seal Arbitration* (Washington), Vol. IV, p. 388.

claim as promulgated in the imperial ukase, he maintained, failed to take notice of this important qualification, and so was "an encroachment on the freedom of navigation, and the inalienable rights of nations." The British Foreign Secretary, referring to a conference that he had had with the Russian Ambassador, continued that he had little doubt the public notification by Russia that she would "consider the portions of the ocean included between the adjoining coasts of America and the Russian Empire as a *mare clausum*, and to extend the exclusive territorial jurisdiction of Russia to 100 Italian miles" from the shore would be recalled.⁸⁰

Thus we see a notable British Minister for Foreign Affairs, an acknowledged expert through long practice in the law governing the intercourse between nations, formally stating to his chief, the then premier of Great Britain, that, according to international law as formulated by the publicists learned in that science and also by the actual practice of nations, the claim of Russia was not valid to exercise, to the exclusion of others, her sovereignty not only over a vast expanse of the Pacific Ocean adjoining the Russian shores, but also over Bering Sea which was bounded by her coasts, though with many passages of water more than six miles wide connecting Bering Sea with the main ocean.

That the maintenance of the freedom of the Pacific Ocean and Bering Sea was the chief aim of Great Britain is proved by the following instructions of Secretary George Canning to Sir Stratford Canning as the latter was about to take up the negotiations with the Muscovite Government at the point they had been left off by his predecessor, Sir Charles Bagot. The British Foreign Secretary towards the end of his instructions said:⁸¹

It remains only in recapitulation, to remind you of the origin and principles of this whole negotiation.

It is *not* on our part, essentially a negotiation about limits.

It is a demand of the repeal of an offensive and unjustifiable arrogation of exclusive jurisdiction over an ocean of unmeasured extent; but a demand qualified and mitigated in its manner, in order that its justice

⁸⁰ *United States, No. 1 (1893), Bering Sea Arbitration, British Case (London)*, pp. 41, 42.

⁸¹ *Fur Seal Arbitration, British Case (Washington)*, Vol. IV, p. 448.

may be acknowledged and satisfied without soreness or humiliation on the part of Russia.

We negotiate about territory to cover the remonstrance upon principle.

But any attempt to take undue advantage of this voluntary facility, we must oppose.

The principal aim of the British Empire, thus we see, as stated by her chief Secretary for Foreign Affairs to his accredited representative in the negotiations with the Muscovite Empire, was to obtain from that latter empire an official disclaimer of the claim put forward in the ukase of 1821 that the waters of Bering Sea as well as parts of the northern Pacific Ocean were exclusively Muscovite territorial waters. The Muscovite Empire would not agree to recognize the waters of Bering Sea and the northern Pacific Ocean, except the conventional territorial zone, as part of the high seas, unless at the same time the land frontier between the two empires in North America was so settled as to secure to the Russian Empire an unbroken *lisière* on the mainland from the Portland Canal up to Mount Saint Elias. On this latter point of the land boundary, Great Britain finally, after a long diplomatic contest, yielded.

In the treaty signed at St. Petersburg, on February 16/28, 1825, by Sir Stratford Canning, acting for the British Empire, and Count Nesselrode and Monsieur de Poletica, in behalf of the Muscovite Empire, the Russian Government formally renounced its pretension to absolute jurisdiction over the waters of the North Pacific Ocean or Bering Sea beyond the conventional territorial limit along the coasts, and the two governments also arranged for a definite land frontier between their respective North American possessions.

The agreement whereby Russia recognized the freedom of the seas over which she had asserted the right of exclusive jurisdiction was embodied in the first article of the new treaty, which read:⁸²

⁸² *Fur Seal Arbitration* (Washington), Vol. IV, p. 42. Here follows the French text of this treaty. *Ibid.*, p. 500.

ARTICLE I.

Il est convenu que dans aucune partie du Grand Océan, appelé communément Océan Pacifique, les sujets respectifs des Hautes Puissances Contractantes ne seront ni troubles, ni gênés, soit dans la navigation, soit dans l'exploitation de la pêche,

ARTICLE I.

It is agreed that the respective subjects of the High Contracting Parties shall not be troubled or molested in any part of the ocean, commonly called the Pacific Ocean, either in navigating the same, in fishing therein, or in landing at such parts of the coast as shall not have been already occupied, in order to trade with the natives, under the restrictions and conditions specified in the following articles.

The restrictions referred to in the above article, had to do with the land, and not with any part of the high seas.

Bering Sea and Hudson Bay much resemble each other. They are surrounded in large measure by land; and previous to and at the time the Treaty of 1825 was agreed to by Great Britain with Russia and subsequently until the purchase of Alaska in 1867 by the United States, in both cases that surrounding land was held by a single nation. If the entrances to those two bodies of inland waters, one called a "sea," and the other a "bay" were six miles or less across, both, in 1825 when the Russo-British treaty of February 16/28 of that year was concluded, would by the doctrine of *mare clausum* have been considered closed seas. Russia had declared her exclusive right of sovereignty over Bering Sea, as well as part of the Pacific Ocean to the southward, and was anxious to retain Bering Sea under her scepter as a closed sea. But Great Britain, like the United States, objected to the extension of the Russian jurisdiction beyond three miles from shore,⁸³ on the ground that according to the accepted principles of the law of nations, Bering Sea was a part of the high seas. And the Muscovite Empire, as it had given up the same point to the American Republic in the treaty of April, 1824, yielded to the British Empire the Russian claim that Bering Sea was a *mare clausum*. If, however, Bering Sea was an open sea as the British Imperial Government claimed so successfully in 1825, why then, on that same line of argument of the British Imperial

soit dans la faculté d'aborder aux côtes, sur des points qui ne seroient pas déjà occupés, afin d'y faire le commerce avec les indigènes, sauf toutefois les restrictions et conditions déterminées par les Articles qui suivent.

⁸³ *United States, No. 1 (1893), Bering Sea Arbitration, British Case* (London), pp. 5, 43.

Government is not Hudson Bay a part of the open sea? Surely the able contentions and statement of facts presented by the official representatives of Great Britain that Bering Sea was not a closed sea, in the negotiations that resulted in the Treaty of 1825, are applicable to the analogous case of Hudson Bay.

The purchase of Alaska in 1867 by the United States, made the status of Bering Sea as an open sea additionally secure, because two Powers from that time divided between them the encircling land. And having obtained possession of Alaska, especially of the Pribiloff Islands where the fur seals breed, the United States Government tried to care for the preservation of the herd. Then pelagic or deep sea sealing developed and threatened the speedy extinction of seal life in Alaskan waters.

On August 19, 1887, Mr. Bayard, the American Secretary of State, tried, in a broad and statesmanly way, to protect the rapidly diminishing fur seal herd of the Pribiloff Islands against unnecessary further depletion, by asking the British, Russian and Japanese Empires to join the American Republic in an international agreement to so regulate the hunting of fur seals, that the number of those valuable animals would not year by year continue to diminish.⁸⁴ All these Powers were ready to agree, until Canada called a halt on the British Empire.⁸⁵

The failure of this effort of the American Government to secure the proper protection of the seals from extermination was preceded by positive action looking to that end. Three Canadian fishing vessels — the *Carolena*, the *Onward* and the *Thornton* — while engaged in hunting seals in the waters of Bering Sea further than three miles from the shores of the Pribiloff Islands, were seized by an American revenue cutter, the *Corwin*.⁸⁶ The *Corwin* captured them *flagrante delicto*. These three vessels were taken by the *Corwin* to Unalaska. There Judge Dawson of the United States District Court,

⁸⁴ *Fur Seal Arbitration, Appendix to American Case* (Washington), Vol. I, pp. 168-194, bound up in Vol. II.

⁸⁵ Thomas Willing Balch, *L'Évolution de l'Arbitrage International* (1908), pp. 77-79; *Fur Seal Arbitration* (Washington), Vol. V, pp. 527-529.

⁸⁶ *Fur Seal Arbitration* (Washington), Vol. IV, p. 93.

acting upon the doctrine that Bering Sea was a closed sea,⁸⁷ condemned the captain and mate of the *Thornton* to an imprisonment of thirty days, and the payment of a fine. Later the vessels were condemned and ordered to be sold for having caught fur seals in American waters. The British Ambassador at Washington, Sir Lionel West, called Secretary Bayard's attention to the fact that the American Government seemed to claim possession of all the eastern part of Bering Sea. After some further correspondence between these two diplomats, the American Government ordered the release of these vessels without prejudice, however, to any question of rights then in dispute.⁸⁸

On the 10th of September, 1887, the Marquis of Salisbury, in a communication to the British Ambassador at Washington, Sir Lionel Sackville West, discussed the attempt of the United States to seize Canadian sealing vessels in the waters of Bering Sea beyond the traditional three-mile limit of territorial jurisdiction. Speaking of the cases of the *Carolena*, *Onward* and *Thornton*, the Marquis of Salisbury said that, while the United States asserted these vessels were seized in American territorial waters, yet, according to the evidence of the masters and crews of these same vessels, they were captured seventy-five, one hundred and fifteen and seventy miles respectively from the nearest land, and so in the open sea.⁸⁹ It was not disputed, he continued, that these captures were made at a distance "from land far in excess of the limit of maritime jurisdiction" that any Power could claim by the law of nations, and that it was scarcely "necessary to add that such limit cannot be enlarged by any municipal law." Thus a premier of Great Britain, the actual executive head of the British Empire, of which Canada was and is a part, asserted that Bering Sea was part of the open sea and free to the navigation and commerce of all nations.

Mr. James G. Blaine, Mr. Bayard's successor as Secretary of

⁸⁷ *Fur Seal Arbitration, Appendix to American Case* (Washington), Vol. I, p. 113, bound up in Vol. II.

⁸⁸ Thomas Willing Balch, *L'Évolution de l'Arbitrage International* (1908), p. 76.

⁸⁹ *Fur Seal Arbitration* (Washington), Vol. IV, p. 99.

State, sought to accomplish the same object of protecting the seals, by advancing again the proposition that Bering Sea was a closed sea.⁹⁰ That argument when pressed before the Paris International Tribunal of Arbitration in 1893, naturally and rightfully fell to the ground; but any attempt today to assert that Hudson Bay is a closed sea is just as absurd as that foolish attempt on the part of America to distort in the case of Bering Sea a well recognized rule of the law of nations. But, in order to save the seals, the United States, concurrently with the above plea that Bering Sea was a closed sea, also claimed, since the seals lived when ashore entirely on American land, a right of possession in the animals when outside the three-mile territorial zone. These claims Great Britain denied, and they were submitted to an international tribunal of five distinguished jurists.

In the printed case of Great Britain in the Bering Sea Fur Seal Arbitration, the British Empire formally maintained that Bering Sea is an open sea and as such forms a part of the common highway of nations; and that unless there was a treaty or other international agreement to the contrary all Powers have the right "to navigate and fish in such waters and no mere declarations or claims by any one or more nations can take away or restrict the rights of other nations." In addition, the British case stated that these rights could not be taken from a nation merely because she had not made use of them. They are, in fact, the British case went on to say, "the common heritage of all mankind, and incapable of being appropriated by any one or more nations."

Then immediately the following passage from the American jurist, James Kent, is quoted as "correctly" stating the "rights and interests of nations in the open sea."⁹¹

"The open sea," Kent says, "is not capable of being possessed as private property. The free use of the ocean for navigation and fishing is common to all mankind, and the public jurists generally and explicitly deny that the main ocean can ever be appropriated."

⁹⁰ *United States, No. 4 (1893), Bering Sea Arbitration, British Argument* (London), p. 3.

⁹¹ *Fur Seal Arbitration* (Washington), Vol. IV, p. 107.

Then later on, the British printed case cites with approval those passages from Emer de Vattel and Dr. Bluntschli in which those two well known publicists expressly state that Hudson Bay is a part of the open sea. Thus we find that the British Government, as the representative of the British Empire and acting on behalf of Canada in particular in a case before an international court of arbitration composed of distinguished jurists of world-wide renown, in 1893, gave its public approval to the recognition of Hudson Bay being a part of the open sea and so open freely to the vessels of all nations.

But that is not all. In the British printed argument in the Bering Fur Seal case before the Paris International Tribunal in 1893, the British Government said:⁹²

And there is another law to which that Government [the British] appeal with equal confidence — the law on which depends the freedom of the sea.

What is the freedom of the sea?

The right to come and go upon the high sea without let or hindrance, and to take therefrom at will and pleasure the product of the sea. It is the right which the United States and Great Britain endeavored, and endeavored successfully, to maintain against the claim of Russia seventy years ago. It is the right in defense of which, against excessive claims of other nations, the arguments of the United States have in former times held so prominent a place.

And what is this claim to protect the seal in the high sea? It is, as of right and for all time, to let and hinder the vessels of all nations in their pursuit of seals upon the high sea: to forbid them entrance to those vast seas which the United States have included in the denomination of the "waters of Alaska;" to take from these vessels the seals they have lawfully obtained; and to search, seize, and condemn the vessels and the crews, or with show of force to send them back to the ports from which they set out.

And so, according to the contention of the United States [in the case of Hudson Bay, the British Empire], "protection of an industry" at sea justifies those acts of high authority which by the law of nations are allowed only to belligerents, or against pirates with whom no nation is at peace.

From giving its high sanction to these views this Tribunal may well shrink: and it is with no mere idle use of high-sounding phrase that Great Britain once more appears to vindicate the freedom of the sea.

⁹² *United States, No. 4 (1893), Bering Sea Arbitration, British Argument (London), pp. 7-8.*

Yes, it is "with no mere idle use of high-sounding" words that in defending the right of all nations freely to navigate and fish in so large a body of water as Hudson Bay that the United States when they defend their rights of fishing in Hudson Bay, as on several occasions before they have defended analogous rights in other parts of the seas, are safeguarding the freedom of the high seas.

Again, in the controversy between the American Republic and the British Empire over the eastern boundary of the *lisière* of Alaska, light is cast upon the status of Hudson Bay as being a part of the high seas.⁹³

By the Treaty of 1825, between Russia and Great Britain, it was provided in the third and fourth articles that the eastern boundary of the *lisière* that was to belong to the Muscovite Empire between Mount Saint Elias in the north down to the head of the Portland Canal or Channel in the south, should be drawn by a line following the crest of the mountains, but never further than ten marine leagues inland from the shore and parallel to the sinuosities of the coast.

The original text of the treaty, word for word, is as follows:⁹⁴

ARTICLE III.

The line of demarcation between the possessions of the High Contracting Parties upon the coast of the continent and the islands of America to the northwest shall be drawn in the manner following:

Commencing from the southernmost point of the island called Prince of Wales Island, which point lies in the parallel of fifty-four degrees

⁹³ Thomas Willing Balch, *The Alaska Frontier* (1903); *Alaskan Boundary Tribunal, American Case* (Washington); *American Counter Case* (Washington); *American Argument* (Washington).

⁹⁴ *Fur Seal Arbitration* (Washington), Vol. IV, p. 501. The original French text follows: —

ARTICLE III.

La ligne de démarcation entre les possessions des Hautes Parties Contractantes sur la côte du continent et les îles de l'Amérique nord-ouest, sera tracée ainsi qu'il suit:

A partir du point le plus méridional de l'île dite *Prince of Wales*, lequel point se trouve sous le parallèle du 54^{me} degré 40 minutes de latitude nord, et entre le 131^{me} et le 133^{me} degré de longitude ouest (méridien de Greenwich), la dite ligne remontera au nord le long de la passe dite *Portland Channel*, jusqu'au point de la terre ferme où elle atteint le 56^{me} degré de latitude nord; de ce

forty minutes north latitude, and between the one hundred and thirty-first and the one hundred and thirty-third degree of west longitude (meridian of Greenwich), the said line shall ascend to the north along the channel called Portland channel, as far as the point of the continent where it strikes the fifty-sixth degree of north latitude; from this last-mentioned point, the line of demarcation shall follow the summit of the mountains situated parallel to the coast as far as the point of intersection of the one hundred and forty-first degree of west longitude (of the same meridian); and finally, from the said point of intersection, the said meridian line of the one hundred and forty-first degree, in its prolongation as far as the Frozen Ocean, shall form the limit between the Russian and British Possessions on the continent of America to the northwest.

ARTICLE IV.

With reference to the line of demarcation laid down in the preceding Article, it is understood:

First, That the island called Prince of Wales Island shall belong wholly to Russia.

Second, That wherever the summit of the mountains which extend in a direction parallel to the coast, from the fifty-sixth degree of north latitude to the point of intersection of the one hundred and forty-first degree of west longitude, shall prove to be at the distance of more than ten marine leagues from the ocean, the limit between the British Possessions and the line of coast which is to belong to Russia, as above mentioned, shall be formed by a line parallel to the windings [sinuosités] of the coast, and which shall never exceed the distance of ten marine leagues therefrom.

dernier point la ligne de démarcation suivra la crête des montagnes situées parallèlement à la côte, jusqu'au point d'intersection du 141^{me} degré de longitude ouest (même méridien), et, finalement, du dit point d'intersection, la même ligne méridienne du 141^{me} degré formera, dans son prolongement jusqu'à la Mer Glaciale, la limite entre les possessions Russes et Britanniques sur le continent de l'Amérique nord-ouest.

ARTICLE IV.

Il est entendu, par rapport à la ligne de démarcation déterminée dans l'Article précédent:

1°. Que l'île dite *Prince of Wales* appartiendra toute entière à la Russie.

2°. Que partout où la crête des montagnes qui s'étendent dans une direction parallèle à la côte depuis le 56^{me} degré de latitude nord au point d'intersection du 141^{me} degré de longitude ouest, se trouveroit à la distance de plus de dix lieues marines de l'océan, la limite entre les possessions Britanniques et la lisière de côte mentionnée ci-dessus comme devant appartenir à la Russie, sera formée par une ligne parallèle aux sinuosités de la côte, et qui ne pourra jamais en être éloignée que de dix lieues marines.

As a result of the foregoing treaty agreement, at all times down to 1867, Russia, as the owner of Alaska, claimed an *unbroken lisière* of territory on the mainland between Mount Saint Elias and the Portland Channel or Canal so that all the fiords that bulged into the mainland to the north of the Portland Channel were enclosed in their entirety from their mouths to their heads by Muscovite territory, thereby excluding the British dominions from every direct outlet on sea water above $54^{\circ} 40'$ north latitude. That claim of Russia, openly expressed, was never contested by Great Britain. When the United States bought Alaska from the Emperor of all the Russias, America also claimed that she had thereby obtained an unbroken strip of land above $54^{\circ} 40'$, excluding Great Britain from all direct access to salt water at all points above the Portland Canal. It was not until the eighties that this right of America to an unbroken *lisière* above $54^{\circ} 40'$ began to be questioned.

About 1884 Major-General D. R. Cameron — who was selected by Lord Derby, the British Secretary of State for the Colonies, at the instance of Sir Charles Tupper, at that time High Commissioner for Canada to report on the Alaska boundary — started the claim that the British Empire was entitled to a western frontier above $54^{\circ} 40'$, that would cross most of the inlets that advance into the mainland between the Portland Channel and Mount Saint Elias so as to leave the upper reaches of these inlets or fiords within the jurisdiction of the Dominion of Canada.⁹⁵ General Cameron based his conclusion on the ground that, in measuring the ten marine leagues or thirty miles inland to find the eastern frontier of the American *lisière*, as provided for by the Treaty of 1825 between Russia and Great Britain, not the actual coast line of the mainland should be taken, but the outward line of the zone of territorial waters along that coast line. He justified this theory on the well known rule of international law that each sovereign nation has within its jurisdiction the salt water along its coast line to a distance of three miles, and also upon that other equally well recognized rule of the

⁹⁵ *Senate Ex. Doc., No. 146, 50th Cong., 2d Sess., p. 5*; Thomas Willing Balch, *The Alaska Frontier* (1903), p. 123; *Alaskan Boundary Tribunal, American Counter Case* (Washington), pp. 160, 162.

law of nations that every sovereign Power has within the zone of its territorial waters and so within its jurisdiction, all the waters of all bays or fiords that cut into its land from the point where such bays first measure six miles across from shore to shore. This theory and argument of General Cameron were presented in 1888 by Dr. George M. Dawson of Canada to Dr. William H. Dall of the United States, during a series of informal conferences that those two experts held to see whether the eastern frontier of the *lisière* of Alaska could not be more exactly delineated than it was up to that time.

This proposition, which was entirely new to Dr. Dall and the United States Government, was first presented officially in a letter of Dr. Dawson to Sir Charles Tupper, a copy of which letter Dr. Dawson gave to Dr. Dall. General Cameron stated these views of the boundary in a memorandum, which Sir Charles Tupper gave in 1888 to the British Colonial Secretary, in which the General says:⁹⁶

Lynn Canal has water ways of less than six miles in breadth at no great distance from its entrance.

It is contended on the Canadian side that the ten marine leagues given as the maximum breadth of the United States coast territory in the second subsection of Article IV, Russo-British Convention of 1825, may not be measured from any point within an inlet not exceeding six miles in breadth, and that, consequently, it is not, under any circumstances, possible that the international boundary can be anywhere so far inland as Perrier Pass.

That this view of General Cameron was not merely his own, but was also adopted by the Government of Canada, is proved by the fact that General Cameron's memorandum presenting his view was given in 1888 by Sir Charles Tupper, High Commissioner for Canada, to the Right Honorable Sir Henry Thurston Holland, British Colonial Secretary, and that in a letter of August 1, 1888, of Sir Charles Tupper to the Colonial Secretary, Sir Charles concurred in protesting against America having a right of possessing the upper ends of the inlets of the *lisière*; that the views expressed in that memorandum were put forward by the British members of the Anglo-American Joint High Commission that met at Quebec in 1898 expressly

⁹⁶ *Alaskan Boundary Tribunal, American Counter Case* (Washington), p. 162.

to arrange, among other things, for the definite location of the eastern boundary of the *lisière* of Alaska; and finally, because in 1902, Lord Lansdowne, the British Chief Secretary for Foreign Affairs, said that Dr. Dawson's views, which embodied those of General Cameron, were official for Canada.⁹⁷

Consequently, it is clear that in the Alaskan boundary controversy, the British Imperial Government and the Canadian Government both approved of the doctrine that all salt water within three miles of the shore, and in the case of fiords or sinuosities such as Lynn Canal, all the waters within the line where first on entering an inlet the distance across from shore to shore measures six miles across should be considered to be within the absolute jurisdiction of the Dominion of Canada. In other words, in that case both those governments gave their formal approval to the rule of the law of nations that in estimating the extent of the territorial waters of bays and other fiords penetrating into the land, the line where first the distance across from the opposite sides of the land encircling a bay should be the double of three miles, or six miles in all, that that line of six miles should be taken as the base from which to measure the territorial waters three miles outward, and that all the part of the bay within that six miles line, no matter how large the bay might subsequently become, was within the jurisdiction of the nation sovereign of the surrounding land. If it was right for the British Imperial and the Canadian Governments to press that rule forward upon the United States Government in behalf of their contention as to how the frontier of the American *lisière* of Alaska should be drawn, surely that same six miles test in deciding what bays are entirely territorial and what are in part a portion of the high seas, is applicable to the case of Hudson Bay. And by that same test urged by the British and the Canadian Governments in support of their contention in the case of the frontier of the Alaskan *lisière*, Hudson Bay is beyond all doubt or cavil a part of the high seas, and so not within the exclusive jurisdiction of Canada, except as to the traditional three-mile zone following the contour of the shores of Hudson Bay.

⁹⁷ *Alaskan Boundary Tribunal, American Counter Case* (Washington), pp. 151, 154, 159, 160, 162.

III.

Since the connection of Hudson Bay with the ocean by means of Hudson Strait is at all places more than six miles across from shore to shore, international law as practiced by nations and interpreted by jurists, shows that that great inland sea is an open and not a closed sea, unless the British doctrine of a "historic" bay can be invoked in favor of Canada. Mr. Westlake, who is acknowledged on all sides as one of the leading British masters of the science of the law of nations, not only by his own British brother jurists, but also by the juriconsults of other nations, thus states the law in deciding whether bays are closed or open parts of the sea.⁹⁸

As to bays, if the entrance to one of them is not more than twice the width of the littoral sea enjoyed by the country in question — that is, not more than six sea miles in the ordinary case, eight in that of Norway, and so forth — there is no access from the open sea to the bay except through the territorial water of that country, and the inner part of the bay will belong to that country no matter how widely it may expand. The line drawn from shore to shore at the part where, in approaching from the open sea, the width first contracts to that mentioned, will take the place of the line of low water, and the littoral sea belonging to the State will be measured outwards from that line to the distance, three miles or more, proper to the State.

The opinion of this learned British jurist, so far squarely supports the freedom of the waters of Hudson Bay. Continuing, he treats in the same paragraph of the doctrine of historic bays, thus:

But although this is the general rule, it often meets with an exception in the case of bays which penetrate deep into the land and are called gulfs. Many of these are recognized by immemorial usage as territorial sea of the States into which they penetrate, notwithstanding that their entrance is wider than the general rule for bays would give as a limit to such appropriation. Examples are the Bay of Conception in Newfoundland, penetrating forty miles into the land and being fifteen miles in average breadth, which is wholly British, Chesapeake and Delaware Bays, which belong to the United States, and the Bay of Cancale, seventeen miles wide, which belongs to France. Similar exceptions to those admitted for gulfs were formerly claimed for many comparatively shallow bays of great width, for example those on the coast of England from Orfordness to the North Foreland and from Beachy Head to Dunnose,

⁹⁸ Westlake, *International Law* (1904), p. 187.

which, together with the whole of the Bristol Channel and various other stretches of sea bordering on the British Isles, were claimed under the name of the King's Chambers. But it is only in the case of a true gulf that the possibility of occupation can be so real as to furnish a valid ground for the assumption of sovereignty, and even in that case the geographical features which may warrant the assumption are too incapable of exact definition to allow of the claim being brought to any other test than that of accepted usage. It is sometimes said and may be historically true that all sovereignty now enjoyed over the littoral sea or certain gulfs is the remnant of the vast claims which, as we have seen, were once made to sovereignty over the open sea, and which it is held have been gradually reduced to a tolerable measure through such intermediate stages as that of the King's Chambers; and the impossibility of putting the claim to gulfs in a definite general form may be thought favorable to that view. None the less, however, the rights which are now admitted stand on a basis clear and solid enough to distinguish and support them.

In the four examples that Mr. Westlake gives of bays whose entrances are more than the regulation six miles in width and yet are recognized by immemorial usage as territorial in their entire extent, in each case this territorial character, in so far as it is acknowledged, is based in large measure upon long accepted usage and unchallenged custom.

The first example cited by this distinguished British jurist in support of the doctrine of historic bays is that of the status of the Bay of Conception in Newfoundland, which is about fifteen miles across at its entrance. The extent of the jurisdiction of the British Crown over the waters of the Bay of Conception was discussed in the case of the *Direct United States Cable Company v. Anglo-American Telegraph Company*. In that case the rights in question between those companies turned on the point whether only a part or all of the waters of the Bay of Conception were subject to British jurisdiction. That is to say, whether the territorial sea should follow the contour of the shores of the bay and be measured out three miles from land, or whether it should be measured seaward three miles from a line drawn across the entrance of the bay where it is fifteen miles from shore to shore. If the former interpretation were correct, the waters in the middle of this fiord belong to the high seas, while if the latter one were sound, the bay in its whole extent comes under British do-

minion. The case came up first in 1874 and 1875 before the Supreme Court of Newfoundland, which found that the bay in spite of its large entrance was entirely under British control. Upon an appeal being taken to the House of Lords, that high court confirmed the decision of the Newfoundland tribunal.⁹⁹ But the criticism on that decision of the eminent British jurist, Professor Holland, a consistently strong upholder of British rights, is an illuminating comment as to the correctness of the interpretation placed upon the law in that case. Dr. Holland says:¹⁰⁰

The subordinate question * * * of the character to be attributed to bays, the entrance to which exceeds six miles in breadth, presents more difficulty than that relating to strictly coastal waters. I will only say that the Privy Council, in *The Direct U. S. Cable Co. v. Anglo-American Telegraph Co.* (L. R. App. Ca. 394), carefully avoided giving an opinion as to the international law applicable to such bays, but decided the case before them, which had arisen with reference to the Bay of Conception, in Newfoundland, on the narrow ground that, as a British Court, they were bound by certain assertions of jurisdiction made in British Acts of Parliament.

In the case of Delaware Bay, the United States asserted, in 1793, its dominion over the whole of that bay, in order to invalidate the French capture of the British merchantman *Grange*, by the French war vessel *l'Ambuscade*, whose restitution Great Britain demanded. Through this request, Great Britain naturally acquiesced in the territorial character claimed by the United States, at that time, for the whole of Delaware Bay. And France, which was not desirous of driving America into alliance with Great Britain against herself, was by the same act forced to acquiesce in the claim. That was a century and a quarter ago. There is a difference between this case and that of Hudson Bay. By demanding the restitution of the *Grange*, Great Britain recognized that Delaware Bay was within the jurisdiction of the United States. But the United States have never given any such assent to the idea that Hudson Bay might be a closed sea.

During the American Civil War, an American Federal merchant

⁹⁹ Law Reports, 2 Appeal Cases, 394.

¹⁰⁰ Holland, *Letters to "The Times" upon War and Neutrality* (1909), p. 133.

vessel, the *Alleganean*, was captured and destroyed by a Confederate naval force in Chesapeake Bay. The owners of the *Alleganean* sought before the court of commissioners of the "Alabama Claims," to recover compensation from the United States, on the ground that as she was destroyed while lying at anchor more than three miles from the nearest shore, and as the entrance of Chesapeake Bay between Capes Charles and Henry is twelve miles wide, the *Alleganean* was seized upon a part of the high seas, and not within the territorial waters of the United States. The American Government defended the action on the ground that the bay was territorial in its entirety. The court held that, as through the commission of various acts in the past, the Bay of Chesapeake had been treated first by the British Crown and then by its successors, the United States, for an infinitely long period of time as entirely within their jurisdiction, all of the waters of Chesapeake Bay were territorial.¹⁰¹

There is a difference between the case of Chesapeake Bay and that of Hudson Bay. For a very long time foreign fishing vessels have not fished in the waters of Chesapeake Bay, while on the contrary, American whalers have hunted the whale for many years and still hunt it in the whole extent of Hudson Bay, the margin of territorial waters following the contours of the shores of that great sea, always excepted.

All three of these cases — the Bay of Conception and Delaware and Chesapeake Bays — were *ex parte* judgments; and in each case the decision accorded with the interests of the Power whose subjects passed upon and decided the case. This was as true when the decisions were given by Americans as by Britons. Such one-party judgments have not the weight and force of the decisions of international courts composed in part of neutral judges, as for example the judgment of the Geneva Tribunal in 1872, in disposing of the "indirect claims" in the Alabama Claims Case.¹⁰²

¹⁰¹ *The Albany Law Journal* (1885), p. 484; Scott, *Cases on International Law* (1902), p. 143.

¹⁰² Thomas Balch, *International Courts of Arbitration, 1874* (1899); J. C. Bancroft Davis, *Mr. Fish and The Alabama Claims* (1893) pp. 98-102; Thomas Willing Balch, *The Alabama Arbitration* (1900); *L'Evolution de l'Arbitrage International* (1908), p. 68; Hackett, *Reminiscences of the Geneva Tribunal of Arbitration, 1872, the Alabama Claims* (1911), pp. 179, 183, 185, 190, 193.

The fourth example of historic bays that Mr. Westlake gives is the Bay of Cancale. In the Treaty of 1839 between Great Britain and France recognizing reciprocally to the fishermen of each nation exclusive rights of fishing along their respective coasts, Great Britain agreed that the Bay of Cancale on the Normandy coast, seventeen miles in width, came within the exclusive French fishing area.¹⁰³ The very fact that the Bay of Cancale was expressly named in that international contract as coming within the French fishing grounds, shows that it would not, according to the then generally accepted law of nations — being almost three times as wide as the customary six-mile test — have been considered exclusively French in its whole extent. That Great Britain, for what she considered a sufficient equivalent, should have agreed over seventy years ago to recognize an extension of the territorial area of France in the case of the Bay of Cancale is not a reason, however, why the nations of America, Europe or Asia should be deprived by Canada of their fishing rights in a great sea-like Hudson Bay. If Canada and the British Empire wish to exclude on legal grounds the fishermen of the rest of the world from following their occupation in the waters of Hudson Bay, they must induce other nations to relinquish the rights of their fishermen in Hudson Bay by offering them something in exchange, just as in 1839 Great Britain gave up the rights of her nationals to catch fish in a large part of the Bay of Cancale in exchange for what she considered a substantial equivalent.

Consequently, if Great Britain and her successor, the Dominion of Canada, propose to make a claim of dominion over all the waters of Hudson Bay, on the "historic" bay theory, it will be necessary for them to show that they have asserted such a claim of possession over that great sea for a long period of time without challenge from other nations. But not only as has been shown above, have famed publicists of various nationalities, like Vattel and Bluntschli and Rivier stated in the eighteenth and nineteenth centuries, that Hudson Bay was a part of the high seas, but also the notable British jurist, Sir Robert Phillimore, in his monumental treatise on *Inter-*

¹⁰³ Westlake, *International Law* (1904), Vol. I, p. 188.

national Law, first published about the middle of the nineteenth century, expressly named Hudson Bay as being an open sea.¹⁰⁴ Surely a British publicist of his standing, who was a legal adviser to the British Crown, would not have made such a statement had it not been in his opinion correct according to the law. In addition, the Institute of International Law, after carefully weighing the evidence, and hearing from its members arguments from many points of view, recommended in 1894, that where dominion had been claimed and recognized by immemorial usage over a bay, such a bay should be considered as a closed sea belonging to the territorial waters of the nation sovereign of the encircling land. But the United States have never given any such assent to the idea that Hudson Bay might be a closed sea. And the need of the assent of the American Government to any claim of Canada to possession of Hudson Bay as a *mare clausum* is upheld by the opinion of a British premier. The Marquis of Salisbury writing in 1887 to the British Ambassador at Washington, *à propos* of the international status of Bering Sea, said:

The pretension which the Russian Government at one time put forward to exclusive jurisdiction over the whole of Bering Sea was, however, never admitted either by this country or by the United States of America.¹⁰⁵

If these words of the executive head of the British Empire were sound when applied to Bering Sea in 1887, why are they not equally sound today, as regards Hudson Bay? And besides, it is only recently that the Dominion of Canada has begun to talk of Hudson Bay as a closed sea. So even on the historic bay theory, the Canadian thesis of a closed sea cannot be maintained.

In addition, however, on two notable occasions Great Britain urged largely in the interest of Canada — and urged with success too — with all the force and skill of her leading jurisconsults on each occasion, doctrines of law that when applied to Hudson Bay make that great part of the ocean an open sea.

¹⁰⁴ Phillimore, *International Law* (1879), 3d ed., Vol. I, p. 284.

¹⁰⁵ *Fur Seal Arbitration* (Washington), Vol. IV, p. 99.

First: In the case of Bering Sea, nearly a hundred years back, as we have seen, Great Britain refused to assent to the claim of Russia that as that sea was bound only by Russian lands, it was a closed sea belonging to her. And the British Empire in that protest, backed by a similar policy on the part of the United States of America, was successful.

Second: When, toward the close of the last century, America attempted to set up a claim to protect the fur seals far out at sea, beyond the three-mile limit, at first on the basis that Bering Sea was a closed sea, Great Britain quickly forced her to retire from such an untenable line of argument. Then the United States, waiving all claim to Bering Sea as a closed sea, sought merely to claim a right of protection over the fur seals in the waters of Bering Sea as they searched for food around their land habitat, the Pribiloff Islands, which since 1867 have belonged to America. The British Empire successfully contested this claim before the Paris Tribunal on the ground that the American jurisdiction over the sea was absolutely limited to three miles from land.

It is hard to understand how the situation of Hudson Bay, encircled by Canadian land, differs from that of Bering Sea, when it was surrounded by Russian land. In both instances the connection with the ocean, in one case with the Atlantic, in the other with the Pacific, is much more than six miles wide. Why is a different interpretation of the law necessary in the case of Hudson Bay from that applied to Bering Sea by Great Britain? That the law should be uniformly applied to both cases is the more apparent, when it is remembered that in the case of the frontier of the Alaskan *lisière*, the Canadian Government gave its assent to and the leading statesmen of the British Government subsequently confirmed, the principle of law, that, in deciding from where the three miles seaward of the territorial sea should be measured in the case of bays more than six miles wide, the line across such bays from shore to shore, where first the estuary was only six miles across, should be taken as the base line for computing the three-mile limit of the territorial sea.

In view of the stand taken by the British Empire in defining the extent of the territorial sea in the waters of Bering Sea and along

the Alaska *lisière*, together with the distinct declaration of Sir Robert Phillimore, an advocate of the British Crown, that Hudson Bay is an open sea, the status of that great sea as a part of the high seas is confirmed by the acts of the British Government and the utterances of its officials.

There is still another sea in North America, enclosed by British lands, which from the earliest times has been recognized, and which is still recognized today as an open sea — the Gulf of St. Lawrence. For this gulf is joined to the ocean by two straits — the straits of Belle Isle and Cabot — both of which are more than six miles wide. Although much smaller than Bering Sea and Hudson Bay, the freedom of the Gulf of St. Lawrence and the right of American fishermen to catch fish in that gulf or inland sea has been recognized by implication in the treaties of 1783 and 1818 between the United States and Great Britain.¹⁰⁶ Mr. Westlake is also of the opinion that the Gulf of St. Lawrence is an open sea.¹⁰⁷

As the Gulf of St. Lawrence — which is as much enclosed by the British lands of Newfoundland and Canada as Hudson Bay is by Canada alone — is an open sea, how then could the British Empire logically maintain that Hudson Bay is a closed sea?

Finally, there is another reason why in the interest of all the world, Canada even included, the free status of the waters of Hudson Bay should be maintained.

Humanity as a whole in the struggle for existence has sought for a long time to mitigate the tortures and horrors of war for individuals, and more recently, especially in the last few decades, even attempted to enable nations to escape in a measure from the destruction and miseries entailed by war. The first of these objects has been accomplished in a slow but nevertheless progressive way by the gradual development of the law of nations. That law by regulating the conduct of individuals and states in war times has done away, more and more, with needless injury to private individuals and their property, and has gradually afforded some relief even to the active combatants

¹⁰⁶ *Treaties and Conventions concluded between the United States of America and other Powers since July 4, 1776* (1889), pp. 377, 416.

¹⁰⁷ Westlake, *International Law* (1904), Vol. I, p. 193.

against the sufferings caused by the clash of nations in war.¹⁰⁸ And the second object, likewise, has been sought by the application of that law to the disputes of nations in an effort to settle their differences, not by mere force, but upon the principles of eternal justice. As the Dutch Privy Councillor, General den Beer Poortugal, has well said:

The more the extent of the area of war can be reduced, the more this brutal power can be restricted to agreed limits, the more are its terrible consequences diminished for peaceful inhabitants.

When powerful nations have coveted the possession of the same rich land, so as to feed and give activity to their growing populations, war has often resulted to settle the difficulty. For while the honor of nations is as safe with their advocates pleading before an international court composed of distinguished jurists as is that of individuals in the hands of their counsels arguing their disputes before the municipal courts, the international tribunals of arbitration have not had the power always to adjust the differences between nations growing out of their mutual desire to appropriate portions of the earth, as the municipal courts, with the whole force of their respective states behind them, are able to decide the disputes growing out of commerce and business competition between individuals. If free trade obtained all over the world, the chief present cause for war would be partly removed. But judging by the past history of the world, universal free trade is an impossibility. Upon the sea, however, free trade has in a great measure won as against a policy of commercial protection. For the fundamental question summed up in the juristic battle between Hugo Grotius and John Selden was in truth a contest whether free trade or protection should prevail upon the seas. And owing to the inability of any one state to appropriate to itself possession of the salt water in the way that the commonwealth can take possession of land, the cause of freedom of trade won

¹⁰⁸ Albericus Gentilis, *De Iure Belli, Libri Tres*, Nunc primum in lucem editi. Ad illustrissimum Comitem Essexiae. Hanoviae, apud Hoeredes Guilielmi Antonii (1612); Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, Lausanne (1751); J. de Louter, *Het Stellig Volkenrecht* (1910); Milenko R. Vesnitch, *Deux précurseurs français du Pacifisme et de l'Arbitrage International* (1911).

the victory in large measure. Had nations been physically able to appropriate the sea as they hold the land, the thesis of Selden and not that of Grotius would have prevailed.

In that judicial contest, each of the protagonists yielded something, Selden the right of navigation,¹⁰⁹ and Grotius the possession of nations to the sea immediately adjoining their shore.¹¹⁰ After the extent of this strip of sea, known as the territorial sea, had been reduced by Bynkershoek and the opinions of many succeeding jurists to relatively small proportions, the principle of "historic bays" was invoked and pushed forward to increase in various parts of the world the area of the territorial sea in the interest of individual nations. And this effort, in which all nations are eager to join, whenever it is a benefit to themselves, tends to restrict the area of the open door upon the seas. In the interest of the peace of the world this effort to extend the territorial sea in restraint of international competition should be halted. For if a great fishing ground is open to the fishermen of all the world subject to proper international regulations to protect not only the fishermen themselves, but also the maintenance of the fishery, there is not in the case of such a portion of the seas that cause for the desire on the part of some Powers to obtain what another enjoys but which they can not touch, that in the final analysis is the cause of war.

Therefore, in the interest of all nations, Hudson Bay should remain what it has been in the past, an open sea.

THOMAS WILLING BALCH.

¹⁰⁹ Selden, *Mare Clausum, The Right and Dominion of the Sea* (1663), p. 123 *et seq.*

¹¹⁰ Grotius, *De Jure Belli ac Pacis, Libri, Tres* (1853), liber II, cap. III, sec. VIII.

BOARD OF EDITORS OF THE AMERICAN JOURNAL
OF INTERNATIONAL LAW

CHANDLER P. ANDERSON, Washington, D. C.
CHARLES NOBLE GREGORY, George Washington University.
AMOS S. HERSHEY, Indiana University.
CHARLES CHENEY HYDE, Chicago, Ill.
GEORGE W. KIRCHWEY, Columbia University.
ROBERT LANSING, Watertown, N. Y.
JOHN BASSETT MOORE, Columbia University.
GEORGE G. WILSON, Harvard University.
THEODORE S. WOOLSEY, Yale University.

Editor in Chief

JAMES BROWN SCOTT, Carnegie Endowment for International Peace,
Washington, D. C.

Business Manager

GEORGE A. FINCH, 2 Jackson Place, Washington, D. C.

EDITORIAL COMMENT

THE TREATIES OF ARBITRATION WITH GREAT BRITAIN AND FRANCE.

On March 7, 1912, the Senate advised and consented by a vote of 76 to 3 to the ratification of the proposed treaties of arbitration with Great Britain and France, amending their texts in certain particulars and interpreting by formal resolution the obligation to arbitrate created by the treaties. The final status of the treaties, due to the action of the Senate, is clearly seen from the text of the resolution of ratification which follows in full:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES.

(Legislative day, March 5, 1912; calendar day, March 7, 1912.)

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of a treaty signed by the plenipotentiaries of the United States and Great Britain on August 3, 1911, extending

the scope and obligation of the policy of arbitration adopted in the present arbitration treaty of April 4, 1908, between the two countries, so as to exclude certain exceptions contained in that treaty and to provide means for the peaceful solution of all questions of difference which it shall be found impossible in future to settle by diplomacy, with the following

AMENDMENTS.

On page 3, line 4, after the word "Tribunal" add a comma.

In the same line strike out "may" and insert in lieu thereof "shall."

On page 4 strike out the paragraph commencing on line 28 and ending on line 35.

Provided, That the Senate advises and consents to the ratification of the said treaty with the understanding, to be made part of such ratification, that the treaty does not authorize the submission to arbitration of any question which affects the admission of aliens into the United States, or the admission of aliens to the educational institutions of the several States, or the territorial integrity of the several States or of the United States, or concerning the question of the alleged indebtedness or monied obligation of any State of the United States, or any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe doctrine, or other purely governmental policy.

In the editorial comment in the January number of the *JOURNAL* an impartial summary was given of the provisions of the texts of the treaties, their aims, and purposes, the objections to their ratification contained in the various reports made by the Foreign Relations Committee, and the official interpretation and justification of their terms made by Secretary Knox, who negotiated and signed them on behalf of the United States.

In view of the fullness with which these views were set forth in the comment it does not seem necessary to restate the issues or to summarize the debates immediately preceding the ratification. Therefore, the present comment confines itself to noting the changes made in the texts of the treaties and the interpretation of the treaties contained in the resolution of ratification.

By general agreement and without the taking of a vote, the text of Article I was slightly amended, as proposed in the majority report of the Committee on Foreign Relations, by placing a comma after the word "tribunal" and substituting "shall" for "may" in the following clause, "or to some other arbitral tribunal, as may [shall] be decided in each case by special agreement."

It will be recalled that the majority report proposed to strike from the treaty the third paragraph of Article III investing the Joint High

Commission with the power to determine in case of disagreement whether the question in dispute was or was not justiciable under the obligation created by Article I. This clause, which was the subject of much discussion within and without the Senate, was as follows:

It is further agreed, however, that in cases in which the parties disagree as to whether or not a difference is subject to arbitration under Article I of this treaty, that question shall be submitted to the Joint High Commission of Inquiry; and if all or all but one of the members of the Commission agree and report that such difference is within the scope of Article I, it shall be referred to arbitration in accordance with the provisions of this treaty.

Put to a vote the amendment of the majority report was carried, that is to say, was struck out by a vote of 42 to 40. Having thus accepted the two amendments proposed by the majority report, the Senate passed to the consideration of other amendments offered by individual senators.

The first article submits to arbitration "all differences hereafter arising * * * which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity." Senator Culberson proposed to insert after the word "equity" the following phrase "but which shall not embrace any question which affects the vital interests, the independence, or the honor of either of the two contracting parties, nor any question which concerns the interests of third parties." This amendment was rejected by a vote of 45 to 37.

Senator Bacon then proposed the following amendment as a proviso to the first clause of Article I:

Provided, That this agreement of arbitration does not authorize the submission to arbitration of any question which affects the admission of aliens into the United States, or the admission of aliens to the educational institutions of the several States, or the territorial integrity of the several States or of the United States, or concerning the question of the alleged indebtedness or moneyed obligation of any State of the United States or any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe doctrine, or other purely governmental policy.

The vote on this stood 41 to 41 and the Vice-President declared it lost. It will be noted, however, that Senator Bacon's amendment reappears in its entirety as the official interpretation in the resolution of ratification, and the first part of it dealing with admission of aliens to the United States or to educational institutions was immediately adopted upon motion of Senator Chamberlain by a vote of 41 to 38 as a proviso at the end of the first clause of Article I.

There were no further amendments offered and the treaty as modified was reported to the Senate. Senator Lodge thereupon proposed a resolution of ratification which took note of the action of the Senate, including Senator Chamberlain's proviso.

Senator Bacon moved as a substitute for this proviso his former amendment of Article I which had been defeated by the casting vote of the Vice-President, and now changed to the form of a proviso to the resolution of ratification. This time he was more successful as the substitute was carried by a vote of 46 to 36 and as adopted it became the official interpretation of the Senate. The resolution as amended was then agreed to by a vote of 76 to 3 and the French treaty was without objection advised and consented to upon like conditions. Included in the resolution of ratification the substitute has practically the force of an amendment of the treaty for it was held by the Supreme Court in the case of *Doe v. Braden* (16 Howard 635, 656), that

where one of the parties to a treaty, at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument or adding a new and distinct stipulation, and the treaty is afterwards ratified by the other party with the declaration attached to it, and the ratifications duly exchanged, the declaration thus annexed is a part of the treaty and as binding and obligatory as if it were inserted in the body of the instrument.

It is of course for the President to determine whether or not he considers the action of the Senate as impairing the value of the treaties. Should he be of the opinion that ratifications thereof should be exchanged, and if Great Britain and France are willing to accept the treaties in their present form, ratifications may be exchanged at any time agreed upon and the treaties be proclaimed. The question is one of expediency for the President and the Secretary of State to decide.

MEDIATION IN THE TURKO-ITALIAN WAR.

The war between Italy and Turkey has for some months past been reduced to a situation which may be compared to a stalemate. Both parties seem able to hold their own, yet neither party is able to push the other any further. Italy is in secure possession of the town of Tripoli and the surrounding country, but she is unable to push further back and conquer the entire territory. Turkey is still in possession of the mountains in southern Tripoli but cannot drive the Italians from the coast. Italy has thus far limited the scene of operations to Tripoli

and Cyrenaica. She might strengthen her position and bring Turkey to terms if she carried the war into the Eastern Mediterranean and captured important towns in Europe and Asia Minor, but for the present she is apparently precluded from doing so by a desire not to interfere with neutral commerce in that section. Turkey, on the other hand, might take effective action in ousting the Italians if she were able to send troops by land either to the scene of action or to Italian territory in Europe.

This being the situation, it is now an opportune time for the Powers to intervene. Having apparently delayed their good offices to prevent the war from breaking out, the Powers may now take steps to put an end to it when it has become a public nuisance. Mediation at this point will not deprive Italy of any substantial advantages she has gained, and it will enable Turkey to retire gracefully before the decree of a conference of the Powers rather than to submit to dictation from Italy. It is perhaps somewhat less humiliating for a man to be deprived of his property by a higher power exercising a right of "eminent domain" than to be plundered by a single individual. This does not imply that Italy had no ground of war against Turkey. Her alleged grievances may have been very real ones, only they were not stated before the world in clear and definite terms before the war began. Meanwhile some little light has been thrown upon Italy's motives. In the preamble to the bill ratifying the decree of annexation, it is stated that,

Italy has always regarded the equilibrium of political influences in the Mediterranean as her vital interest and has constantly held her possession of a free hand economically and politically in Tripoli and Cyrenaica to be essential thereto. Italy had for years striven to attain this end by fair and peaceful means, and would not have had recourse to arms, had any other solution been possible and had all forms of Italian activity in Lybia not met with persistent and systematic opposition from the Ottoman Government.

This statement adds no details as to the character of that "systematic opposition" to Italian enterprises in Tripoli which figured as the chief complaint in the ultimatum to Turkey. What is meant by the "possession of a free hand * * * politically" it is difficult to say, but it suggests some sort of a protectorate over Tripoli which Italy asserts to be necessary to the maintenance of an equally vague "equilibrium of political influences in the Mediterranean." The Italian premier in his defense of the annexation bill went a step further and is reported as saying that in Italy, as in all civilized countries, the colonial problem made itself felt

as a supreme necessity, and that Italy could never have tolerated the occupation by others of Tripoli, her steadfast goal. The two motives are quite distinct. On the one hand, Italy feels that colonial expansion is a national necessity, and, on the other hand, she fears that the one opportunity open to her may be seized by others. The occupation of Tripoli is thus regarded as analogous to the occupation by the other Powers of the lower portion of the African continent. Italy claims that as Turkey had done nothing to improve the territory it was right that Italy should be allowed to do so. Being prevented from doing so by alleged Turkish opposition to Italian enterprises, Italy enters upon the war, and she is all the more prompt to take this step for fear lest other Powers should anticipate her on a similar civilizing mission. All this seems very plausible, but we are still confronted with the question in the Turkish reply to the ultimatum as to the "nature of the guarantees" which Italy would have considered sufficient for the protection of her economic interests in Tripoli. To this question no reply has been given and apparently none can be given. Ancient Rome looms large on the modern horizon and is not Italy heir-at-law of the unoccupied or adjacent provinces of the wondrous Empire?

Apart from the opportuneness of mediation at this point of the contest it is highly desirable for the Powers to put an end to the war. Italy cannot afford to continue a war in which she is making so little progress. The situation is one where not to advance is to go back. Taxation continues while the opposing forces are resting on their arms. On the other hand, Turkey is faced with the danger of a revolt in her European provinces. Albania, Macedonia, and Crete could want no better moment for a final effort to shake off the Turkish yoke. Europe on its part can not be indifferent to the prospects of a conflagration in the Balkans. The difficulty is in the absence not of a realization on the part of the Powers of the need of mediation but of an agreement as to the basis of such mediation. Italy has committed herself to the annexation of Tripoli as the *sine qua non* of a treaty of peace. Turkey refuses to consider the terms. How can the Powers bring pressure upon Italy to modify her demand or upon Turkey to comply with it as it stands? Russia has her own designs for securing a free egress from the Black Sea to the Mediterranean. Austria is not indifferent to the fate of Albania. Bulgaria, with the backing of a formidable army, can not but sympathize with those of her own race in Macedonia. On the whole, it is very probable that if a European conference should meet to act

upon the situation, not only will the question of Tripoli be disposed of, but a new status will be given to the Turkish provinces west of Constantinople.

In a recent work entitled *The Turco-Italian War and Its Problem*,* Sir Thomas Barclay points out that Italy's real case was not the existence of the grievances referred to in the ultimatum but motives of a deeper character based upon a long-standing sentiment that Tripoli naturally belonged to Italy against all the world except Turkey, — a sentiment which has found expression in the treatment of Tripoli by Italy as practically an Italian dependency. While insisting strongly upon the maintenance of the sanctity of treaties and of good faith between nations, the author thinks that now that the offense has been committed the only course is for the offender to make amends by payment of an indemnity. Following out this idea the author proposes a draft recommendation to be offered to the parties by England as mediator. The document is of such an interesting character that it is reproduced below:

Whereas, under Art. 3, of the Hague Convention for the pacific settlement of international disputes, 1899-1907, Powers strangers to the dispute have the right to offer their good offices or mediation, even during the course of hostilities; and, under Art. 6, good offices and mediation, either at the request of the parties at variance, or on the initiative of Powers strangers to the dispute, have exclusively the character of advice, and never have binding force; and, under Art. 7, if mediation occurs after the commencement of hostilities, it causes no interruption to the military operations in progress, unless there be an agreement to the contrary;

Whereas Italy and Turkey are unhappily at war, and an Italian army is in occupation of the coast of Tripolitana and Cyrenaica, and Turkey is faced with the alternative of ceding the said provinces, which, owing to Italy's command of the sea, she is unable to defend with any hope of ultimate success or of continuing the war indefinitely with all its attendant miseries and cruelties to a brave and loyal population;

Whereas the Parties have agreed to the mediation of Great Britain and have further agreed to an armistice of three weeks for the purpose of enabling the British Government to formulate suggestions of settlement; —

The British Government, having fully considered the cases of the contending Parties, makes the following recommendations: —

1. Italy shall cancel her decree of annexation of the said provinces and shall undertake to indemnify Turkey for any consequences thereof;

2. She shall also undertake to indemnify Turkey for all damage, direct or indirect, suffered by the Ottoman Government or Ottoman subjects in connexion with the hostilities she has carried on in Tripolitana, Cyrenaica and elsewhere.

* The book will be reviewed in a later issue of the JOURNAL.

3. She shall agree, in case the other Powers shall so agree, to release Turkey from the obligations imposed on her by the Capitulations;

4. The amount of the indemnity payable to Turkey, in respect of the above two sources of loss, shall be submitted for assessment to the International Court of Arbitration at the Hague, such amount not to be less than (say) T. 5,000,000;

5. In consideration of the above undertakings and those set out below, Turkey shall agree to cede Tripolitana and Cyrenaica to Italy;

6. Italy shall grant in perpetuity to the Mussulman inhabitants of the ceded provinces religious freedom and the right to the full external observance of their religious ceremonies; enjoyment of the same civil and political rights as may be possessed by their fellow-inhabitants belonging to other religions; the right to use the name of H. I. M. the Sultan, as Khalif, in public prayers; recognition of Mussulman pious foundations (*wakoufs*); and untrammelled liberty of communication by Mussulmans with their religious heads at Constantinople, etc., etc.

RECENT POLITICAL DEVELOPMENTS IN CHINA

Events in China have moved with such bewildering rapidity that a brief review of the principal features may be helpful.

The immediate or precipitate cause of the recent disturbances was the adoption by the Imperial Chinese Government in the summer of 1911 of the policy of the nationalization or state ownership of railways; but among the underlying primary causes may be noted (1) Chinese-Manchu mutual antagonism; (2) dissatisfaction with Manchu inefficiency and misrule as exemplified in the weakness and corruption of the Prince Regent and many of his advisers; (3) the inflaming of the Chinese mind by often exaggerated statements in the vernacular press describing the baneful political conditions; (4) the activities of secret societies, and of returned students from Japan, the United States and Europe; and (5) the unrest resulting from successive famines during recent years in the Yangtze Valley, the numerous financial panics, and the plague in the winter of 1910-1911 in Manchuria. In a word, the revolution was essentially anti-dynastic.

On October 10th last five natives charged with being revolutionists were arrested in the Russian concession at Hankow, in the native section of which city a few hours later they were executed. This act resulted during the night in the mutiny of several hundred troops in Wuchang, opposite Hankow, who burned their barracks. The following day all the new army force at Wuchang, numbering 50,000 men, joined the revolutionists. Then followed in rapid succession the seizure of that city, the burning of the Viceroy's yamen, that official barely making good

his escape on a Chinese gunboat lying in the harbor, and the seizure of the arsenal as well as the provincial treasury and mint. A day later the revolutionists crossed the Yangtze River and captured the city of Hanyang with its arsenal and the great iron and steel works. The native city of Hankow quickly fell into the hands of the revolutionists. There was an uprising on October 20th in Nanking, the ancient Chinese capital. Three weeks later Canton declared its independence of the Manchus, and revolutionists, in many instances acting quite independently of any central authority, captured Foochow, Amoy, Hangchow, Soochow, and a long list of other important cities, many of them being the capitals of the central and northern provinces; they also acquired complete control in Shanghai, which thereupon became the headquarters of the insurrection.

At the same time the revolutionary movement met with reverses at Nanking. The Manchu general stationed there with about 10,000 troops refused to accede to the revolutionists' demands; whereupon the latter made an attack but were compelled to retire because of lack of ammunition. The next day the Manchu soldiers descended from the forts and overran the city, massacring thousands of the innocent inhabitants, men, women, and children, — all who were suspected of progressive tendencies, — while the revolutionary forces, 20,000 in number, waiting the arrival of ammunition from Shanghai, looked on helplessly.

Meanwhile the revolutionists, or the republicans, as they styled themselves, had established a cabinet form of government, with Wu Ting-fang, formerly Chinese Minister to the United States, as Minister of Foreign Affairs of the Provisional Government of China. About this time also Yuan Shih Kai, former grand councillor and commander-in-chief of the army and navy, was summoned by edict to Peking to accept the premiership and save the dynasty. After a long delay, Yuan accepted the post, proceeded to form, as a concession to the revolutionists, the first purely Chinese cabinet the Empire ever had, and began negotiations with them looking toward the cessation of hostilities and the recognition of a liberal constitutional form of government, with the Manchu dynasty nominally at its head.

Late in November the Imperial troops after severe fighting retook the city of Hanyang from the revolutionists, the latter retreating in confusion. This victory, however, was speedily followed by a new and determined revolutionary attack upon Nanking which resulted in its capture. The next day it was announced that Urga, the capital of

Mongolia, had declared its independence and banished the Chinese officials. The effect of these reverses and the unsuccessful attempts of Yuan Shih Kai to placate the revolutionists, led to the resignation of Prince Chun, as regent, December 7, in the hope of saving the throne to his son, the young Emperor, Hsuan Tung. Prince Chun was succeeded by a Manchu and a Chinese as joint guardians of the throne.

By this time the insurrection had acquired wide dimensions. All of the eighteen provinces, excepting portions of Chihli, Honan, and Shantung, had revolted, all forts, arsenals, and mints located therein having been seized. The entire imperialist fleet of some eighteen vessels, including four cruisers, had gone over to the revolutionary party; less than one-third of the army remained loyal, the other corps either joining the revolutionists or else declining to obey instructions from Peking.

The army corps stationed at Lanchow, a city in Chihli Province along the Peking-Shanhaikwan Railway, had made twelve demands of the Peking Government. These were presented through the national assembly by whom they were approved, the assembly and the army working in harmony. Edicts, in response to these demands contained apologies for past mistakes, amnesty to political exiles, grant of power to the assembly to frame a constitution, and promise of a new and responsible cabinet in which no member of the imperial family should hold office. Other and later edicts granted an immediate parliament; gave assurance that amendments to the constitution must originate in parliament; that the army and navy, though subject to the control of the Emperor, could not be used in domestic troubles except under regulations to be adopted by parliament; that the premier be elected by parliament, he to appoint ministers of state; and that parliament approve the budget and all treaties. Thus the Manchus were divested of all powers, only a shadow of their former absolute authority remaining.

Yuan Shih Kai, who had been made premier, entrusted with the reconstruction of the cabinet and given the supreme command of the army and navy, apparently lacked the full confidence of either party. On the other hand there were serious dissensions among the revolutionists. Among their organizations there was little cohesion or common leadership, though there did exist a certain unity of purpose; there were also the traditional jealousies of the provinces to be reconciled. The revolutionists south of the Yangtze were for a republic with Sun Yat Sen as president, while those north of the river at first favored a limited monarchy with a Manchu on the throne, merely as a figurehead, but

later stood out for a republic, with Yuan as its head. Thus both parties had come to insist upon the removal of the Manchu imperial family root and branch and the establishment of a republic. Only the Manchus, who number perhaps less than 5,000,000, together with a few extreme conservatives in the factions of the revolutionists, continued to talk of a constitutional monarchy with the retention of the Emperor on the throne. During the second week of December the differences separating the various parties seemed to admit of the possibility of immediate adjustment. On December 18, following the establishment of an armistice, representatives of the imperial government and the revolutionists went into conference at Shanghai. Tong Shao-yi, appointed commissioner on the part of the premier, headed the imperial, and Wu Ting-fang the revolutionary conferees. Wu, on behalf of his associates, presented four proposals; the abolition of the Manchu dynasty, the establishment of a republican form of government, the pensioning of the imperial family, and generous treatment of all Manchus.

On December 20, the American, British, French, German, Russian, and Japanese representatives at Peking delivered informally and unofficially through the consuls-general at Shanghai an identic note to Tong Shao-yi and Wu Ting-fang. This note, besides declaring adherence to the attitude of strict neutrality, called the attention of both parties to the desirability of arriving at an early understanding to end the conflict. This was the first concrete instance of concerted action by the six leading Powers during the disturbances in China, though steps looking toward such common action had been taken previously.

The negotiations of the peace commissioners continued for weeks, during which time a series of armistices was arranged. While these armistices were not always strictly observed the negotiations were never entirely broken off. The discussions of the conference turned upon the question of choosing between a republic and a limited monarchy as the form of government, thus showing further that the first aim of the revolutionists had been the overthrow of the Manchu dynasty. In the meantime, on December 28, Sun Yat Sen was unanimously elected, by the Nanking assembly, provisional president of the Republic of China, and was inaugurated as such on New Year's Day at that city. Finally, the throne, seeing that China proper was almost entirely in favor of a republic, and that the outlying dependencies of Tibet, Turkestan, Mongolia, and Manchuria were breaking away, decided it was best to yield to the popular demand and abdicate from power. The

edicts taking these steps were issued on the 12th of February. Thus the success of the conference was assured.

The Chinese love for compromise was a most potent factor making possible this success; another factor was the fear of foreign aggression. Both parties felt strongly that should two separate governments be established, one northern and one southern, foreign interference might be invited; that China's only hope of preserving her integrity lay in presenting a united front to the Powers.

It should be remarked that foreign life and property have throughout the disturbances been scrupulously respected by both factions. Foreign interference, however, would likely have united the factions and made the movement anti-foreign. Though no anti-foreign feeling manifested itself, yet in view of the seriousness of the disturbances and their general character, the American Minister at Peking was instructed at his discretion to advise his nationals in the affected districts to concentrate at such centers as were easily accessible to foreign troops or foreign men-of-war. Practically all Americans in the interior have during the progress of the disturbances assembled at these central points. The United States Asiatic Fleet, consisting of a score of vessels, several of which had consignments of marines on board, have rendered efficient service in affording all possible protection to American life and property in the coast cities and riverine ports in the interior. The permanent Legation Guard at Peking, composed of a company of marines, was increased early in October soon after the inception of the disturbances to over three hundred, which number was later raised to about five hundred. American marines have also been landed at several ports, often at the request of the native authorities and then only for brief periods.

It is of interest to note that the American Government, recognizing the obligations connected with the rights secured by the protocol of 1901, consented to join the other leading Powers signatory thereto in maintaining an international force of troops to keep open the railway from Peking to the sea. Accordingly, on January 9, 1912, orders were issued for the despatch of five hundred troops from Manila to north China, and on March 6th seven hundred additional troops from the same source were ordered there. This last consignment was to assist in preserving order in Tientsin and in the possible military occupation of the railway. These measures were acquiesced in by the Chinese Government.

In a note of February 3d, in reply to an inquiry from the German Government, Secretary of State Knox declared for the maintenance of

China's territorial integrity, reiterated the policy of non-interference, except by concerted action of the interested Powers, and proposed that the Powers should extend the principle of neutrality also to loans. It is reported that the British and German Governments have stated that the substance of the note is quite in accord with their own attitude, and that Japan and Russia also concurred in the policy of common action for the protection of the common interests in China during the present crisis. With reference to loans to the contending parties, it might be added that the repeated attempts of both the imperialists and the revolutionaries to negotiate loans with foreign bankers ended in failure, owing to the early decision reached by the governments concerned, and that the latter's attitude of strict neutrality precluded them from favoring their nationals rendering financial assistance to either faction.

Yuan Shih Kai was on February 15th unanimously elected Provisional President of the Republic of China by the Nanking assembly. Tong Shao-yi proceeded to Peking as envoy to convey to Yuan the notification of his election and to invite him to go to Nanking, which was at that time fixed as the provisional capital. The draft of the provisional constitution was adopted by the assembly, under which the provisional president is empowered to appoint a premier and form a cabinet. It is understood that after the creation of a permanent parliament that body will draft and adopt a final constitution. The resignations of Sun Yat Sen and his cabinet were accepted by the Nanking assembly to take effect on the inauguration of Yuan Shih Kai, which took place in Peking on March 10th. Tong Shao-yi, nominated by Yuan as premier, was confirmed by the Nanking assembly. A cabinet has since been named.

The concurrent resolution, introduced by Representative Sulzer of New York and passed by the House of Representatives on February 29th and by the Senate on April 13th, may be regarded as a mark of the traditional sympathy and confidence of the American people, expressed through the popular branch of Congress, with the new order of things in China. By the terms of this resolution the American people congratulated the Chinese people on their assumption of the powers, duties and responsibilities of self-government and expressed the confident hope that in the adoption and maintenance of a republican form of government the rights, liberties and happiness of the Chinese people would be secure and the progress of the country assured. This action was, of course, quite distinct from the executive act of recognition of the Republic of China, which will doubtless take place in due time in

accordance with the usual standards established by international law. Meanwhile, the United States has along with the other Powers entered automatically into informal relations with the *de facto* provisional government pending the establishment of such ultimate government as may be adopted.

Absolutism in China has received its death blow; and the new government, dedicated to the liberty, welfare and happiness of its nationals, and committed to stand for progress and reform, will, it is hoped and believed, worthily represent the great Chinese people.

DECISION OF THE SUPREME COURT IN THE CASE OF ROCCA V. THOMPSON¹

On February 19, 1912, the Supreme Court of the United States, in the case of *Salvatore L. Rocca v. George F. Thompson* (in the matter of the estate of Guiseppe Ghio, deceased), affirmed the judgment of the Supreme Court of California that the public administrator, under the law of California, is entitled to letters of administration on the estate of an Italian citizen, dying and leaving an estate in California, in preference to the Consul General of Italy.² The Italian consul based his claim to the right of administration upon the clause in Article XVII of the treaty of May 8, 1878, between the United States and Italy, providing that the respective consular representatives of the two contracting parties shall enjoy "all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade, of the most-favored nation." By virtue of this clause the consul claimed the same rights as are enjoyed by consuls of the Argentine Republic under Article IX of the treaty between that country and the United States concluded on July 27, 1853. This article provides that, in case a citizen of either contracting party shall die intestate in the territories of the other, the consul of the nation to whom the deceased belonged "shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." Two distinct questions were therefore before the court: First, was the Italian consul entitled by virtue of the most-favored-nation clause of the Italian treaty to the same rights as are enjoyed by the Argentine consul under the treaty of 1853? Second,

¹ Printed in *Judicial Decisions*, p. 535.

² See for decision of the Supreme Court of California, this *JOURNAL*, Vol. 4, No. 3, p. 727; 157 Cal. 552.

did the Argentine consul enjoy under the terms of the treaty the right claimed by the Italian consul?

The surrogate of Westchester county, New York (*In re Fattosini's Estate*, 67 N. Y. Supp. 1119, and *In re Lobrasciano's Estate*, 77 N. Y. Supp. 1040), the Appellate Division of the Supreme Court of New York (*In re Scutella's Estate*, 129 N. Y. Supp. 20), and the Supreme Court of Alabama (*Carpigiani v. Hall*, 55 So. Rep. 248), had decided in favor of the Italian consul in cases arising in these States. The Supreme Judicial Court of Massachusetts had taken the same view as to the right of a Russian consul under the most-favored-nation clause of the Russian treaty. (*In re Wyman*, 191 Mass. 276.) The surrogate of New York county (*In re Logiorato's Estate*, 69 N. Y. Supp. 507) and the Supreme Court of Louisiana (*Lanfear v. Ritchie*, 9 La. Ann. 96) had expressed a different view. In none of these cases does it appear that the right of the Italian consul to claim, by virtue of the most-favored-nation clause, any right or privilege enjoyed by the Argentine consuls under the treaty of 1853, was questioned. In the Rocca case this right was questioned by counsel for the public administrator. It was urged that Article IX of the Argentine treaty was based upon reciprocity, in which the rights enjoyed by the Argentine consuls were given for and in consideration of valuable rights granted by the Argentine Republic to consuls of the United States; that these rights thus conferred on the Argentine consuls did not pass, automatically and without an exact equivalent, to the consuls of a third Power by virtue of the most-favored-nation clause; that if the contention of the Italian consul were accepted, the right to administer the estates of aliens dying intestate in this country would, in large measure at least, in view of the many most-favored-nation clauses in this respect in our treaties with foreign Powers, pass to foreign consuls, in preference to the public administrator, resident heirs and next of kin, as generally provided for in the laws of the States, regardless of the fact whether the same privilege was or was not enjoyed by the consular officers of the United States in the countries claiming the right. The rule of construction of the most-favored-nation clause applied in the case of *Whitney v. Robertson* (124 U. S. 190), in respect of special concessions in import duties, based upon valuable considerations, was invoked. The Supreme Court, however, did not find it necessary to pass upon this interesting question and expressly excepted it from the decision. The court found that even the terms of the Argentine treaty, — "the right to intervene in the possession, administration and judicial

liquidation of the estate of the deceased conformably with the laws of the country," — do not give to the consul the right to original administration of the estate, to the exclusion of one authorized by local law to administer; that the sole right conferred, whether in the possession, the administration or the judicial liquidation of an estate, is that of "intervention," and this conformably with the laws of the country. Intervention presupposes a proceeding already instituted. The concluding words of the court are:

Our conclusion then is that, if it should be conceded for this purpose that the most-favored-nation clause in the Italian treaty carries the provisions of the Argentine treaty to the consuls of the Italian Government in the respect contended for (a question unnecessary to decide in this case), yet there was no purpose in the Argentine treaty to take away from the States the right of local administration provided by their laws, upon the estates of deceased citizens of a foreign country, and to commit the same to the consuls of such foreign nation, to the exclusion of those entitled to administer as provided by the local laws of the State within which such foreigner resides and leaves property at the time of decease.

The State courts, in the decisions above cited upholding the right of the consul under the treaty to administer, regardless of State laws to the contrary, necessarily decided that the stipulation was within the treaty-making power of the President and Senate. The Supreme Court, in view of the interpretation placed upon the terms of the treaty, was not called upon to decide this question.

MEXICO

For many years Mexico was justly pointed to as a Latin-American country which, by bitter experience with revolutions, had learned to appreciate the blessings of law and order. This state of affairs was due apparently to one man, Porfirio Diaz, under whose continuous presidency from 1884 to 1911 Mexico assumed an enviable position among the family of nations. It can not be denied that Diaz governed as a dictator, and that his government was emphatically a one-man's government, but there are times when a nation needs a strong guiding hand, and one man is better than none, or a coterie of aspiring, but mediocre, politicians. General Diaz would have done well to prepare his people for self-government, and, under his guidance, to train them in its difficulties and responsibilities. His failure to do so was perhaps his greatest mistake, as it was in large measure the cause of his downfall. It is indeed true

that those that draw the sword perish by the sword, and that a presidency won by revolution is apt to be lost by revolution. The end of a great career in exile is full of pathos, and the revolution which terminated it is a misfortune to the country as well as to the immediate victim.

President Madero came into power by a revolution and, as was to be expected, the lawlessness and disorder incident to revolution has continued after the immediate object of it was obtained, namely, the resignation of Diaz from office and the installation of the leader of the revolt. Mexico needs peace, and there can be no doubt that the majority of the people firmly desire it, but, when rudely shaken, the pendulum swings from one extreme to the other and only gradually assumes the position of equilibrium. That this condition may soon obtain in Mexico is the hope, if not the expectation, of its friends and admirers.

The situation of the United States in revolutionary movements in Mexico and Central America is one of embarrassment because charges are constantly made, which unfortunately are not without foundation, that the United States is made the basis of hostile operations; that supplies are slipped across the border, and that revolutions are financed in the United States. The official publication, entitled *The Foreign Relations of the United States*, teems with complaints of deficiencies in our neutrality laws, and complaints of neglect in the enforcement of the laws. It may well be that the criticism of the laws and complaints of their violations are exaggerated, but where there is so much smoke there must needs be some fire. Thus, it is stated under date of December 23, 1910, that the United States authorities had not prevented the passage of armed insurgents from El Paso to Ciudad Juarez, and under date of January 11, 1911, that the American authorities had not acted upon a request for the arrest of certain revolutionists engaged in violating the neutrality laws in El Paso, Texas. Again, it is alleged that the neutrality laws had been violated, in that revolutionary movements were organized in Texas; that bands of revolutionists were being recruited along the border; that arms and ammunition were procured in the United States and shipped to revolutionists in arms against the government of Diaz, as well as against the government of President Madero.

On March 2, 1912, President Taft issued a proclamation¹ calling attention to the serious disturbances unfortunately existing in Mexico,

¹ Printed in SUPPLEMENT, p. 146.

and, after stating the force and effect of the neutrality laws, gave notice "that all persons owing allegiance to the United States who may take part in the disturbances now existing in Mexico, unless in the necessary defense of their persons or property, or who shall otherwise engage in acts subversive of the tranquillity of that country, will do so at their peril, and that they can in no wise obtain any protection from the Government of the United States against the appropriate legal consequences of their acts, in so far as such consequences are in accord with equitable justice and humanity and the enlightened principles of international law." It is, however, a principle of international law for which authority need not be cited, that private individuals can trade in contraband, although by so doing they subject such ventures to capture and confiscation. The risk is considerable, but if the arms and ammunition, or other material capable of a warlike use, reach their destination, the shippers realize enormous profits at the expense, be it said, of a friendly government which we are morally bound to support as far as we lawfully can. It is quite clear that the best way to prevent arms, ammunition, and other warlike material from reaching revolutionists, is to prevent their exportation, by the apprehension and punishment of all persons engaged in it. By so doing, we shall contribute to the peace of a neighboring country and only act up to the Golden Rule, which the late Secretary Hay impressively stated to be the cardinal characteristic of American diplomacy. Therefore, Senator Root, whose sympathy for and appreciation of Latin America is based upon personal knowledge of actual conditions, introduced a Joint Resolution into the Senate on March 13, 1912, which fortunately passed both the Senate and House on the 14th and was approved the same day by the President. The resolution is based upon the Joint Resolution of April 22, 1898, forbidding the exportation of coal or other material used in war from any seaport of the United States, and authorizes the President of the United States to forbid, in his discretion, the exportation of arms or munitions of war to any American country in which he shall find conditions of domestic violence to exist, and declares that any shipment of such material made after the issue of the President's proclamation, "shall be punishable by fine not exceeding ten thousand dollars, or imprisonment not exceeding two years, or both."

It is difficult to over-estimate the importance of this resolution, for it

introduced a profound change in the neutrality laws of the United States and enables the President to prevent the shipment of arms or munitions of war, not merely to Mexico, but to any American country wherein conditions of domestic violence unfortunately exist, and which are promoted by the use of arms or munitions of war procured from the United States. The President had, by his proclamation of March 2d, found that "serious disturbances and forcible resistance to the authorities of the established government exist in certain portions of Mexico." He, therefore, took advantage of the authority conferred upon him by the Joint Resolution of March 14th, which was promptly approved by him, and, on the same day issued the proclamation provided for in the resolution, by declaring and proclaiming formally that "conditions of domestic violence promoted by the use of arms or munitions of war procured from the United States as contemplated by the said Joint Resolution," do in fact exist and he therefore directed all persons to abstain from all violations of the Joint Resolution and warned them that such violations would be rigorously prosecuted.²

It is not the purpose of this comment to examine conditions in detail, but to call attention to the importance of the Joint Resolution and to the authority conferred upon the President to prevent export of arms and munitions of war procured in the United States, except under such limitations and exceptions as shall prevent their reaching the revolutionists and their employment for a revolutionary purpose contrary to the neutrality laws of the United States and the Joint Resolution of March 14, 1912. If we can go further and prevent revolutions from being financed in the United States, a great step in advance would be taken to secure domestic peace in the sister republics, without which stable government and ordinary progress would seem to be well-nigh impossible

THE HORCON RANCH CASE

Anent the discussion from time to time arising concerning the inability of the United States Government to perform the international obligations assumed in its treaties, an interesting case arising on the water boundary between the United States and Mexico which has recently been decided by the Circuit Court of the United States in and for the Southern District of Texas affords a refreshing precedent for the vindication

² Printed in SUPPLEMENT, p. 147.

of at least a part, albeit a small part, of the treaty obligations of the United States.

An American company acquired a large tract of land comprising some fifty thousand acres in the southern part of the State of Texas and abutting the Rio Grande River, which river forms the boundary line between the United States and Mexico. The company proposed to develop, cultivate and utilize its lands by the establishment of an extensive system of irrigation and to that end it cleared its lands, built canals, reservoirs, roads, towns, bridges, a complete electrical power station, and constructed on the banks of the Rio Grande River a pumping station in which were installed engines and other mechanical appliances necessary to draw and lift into its canal system from the Rio Grande the water needed for irrigation.

During the progress of this development a natural cut-off in the course of the Rio Grande began to take place, which change if fully accomplished would have caused the river to follow a channel remote from the site which had been selected by the company for its pumping station. It seems that this site, by reason of the natural surroundings, was the only one available for the purpose within several miles and the company was therefore unable to change the site to follow the vagaries of the river.

The company at first attempted to prevent the natural change in the course of the river by revetting the shore at or near the impending cut-off, but the nature of the soil made it practically impossible to do this successfully. The company, thereupon, in order to utilize the extensive works which had been constructed looking to the erection of a pumping station at the point selected, decided to protect itself by cutting an artificial channel further up the stream which would prevent the river from flowing through a loop in which the natural cut-off was threatened. This project of the company was carried to completion during the months of June and July, 1906, in ignorance or in disregard of the treaty provisions between the United States and Mexico, and particularly in direct violation of Article III of the boundary convention between the two governments concluded November 12, 1884, which article reads as follows:

Art. III. No artificial change in the navigable course of the river, by building jetties, piers, or obstructions which may tend to deflect the current or produce deposits of alluvium, or by dredging to deepen another than the original channel under the Treaty when there is more than one channel, or by cutting waterways to shorten the navigable distance, shall be permitted to affect or alter the dividing line as determined by the aforesaid commissions in 1852 or as deter-

mined by Article I hereof and under the reservation therein contained; but the protection of the banks on either side from erosion by revetments of stone or other material not unduly projecting into the current of the river shall not be deemed an artificial change.

The cut-off not only changed the course of the established and fixed international boundary line, but resulted in injury and damage to the Mexican owners of the lands opposite the point of the diversion in the following particulars: (1) to growing crops; (2) expenses of constructing levees; (3) loss of land from erosion; (4) loss of riparian rights.

The matter was by the Government of Mexico brought to the attention of the International Boundary Commission, which commission by the convention of 1889 has exclusive jurisdiction to examine and decide all differences or questions that may arise on that portion of the frontier where the Rio Grande forms the boundary line, whether such differences or questions grow out of alterations or changes in the bed of the river or of works that may be constructed therein. By the same treaty the commission was given authority to suspend the construction of any works prohibited by Article III of the convention of 1884, above quoted, pending investigation.

The engineers of the International Boundary Commission investigated the work and found that it had progressed so far as to be beyond control. The commissioners thereupon, after visiting the locality, examining the works, and hearing testimony regarding the case, made the following report to their respective governments:

That the said American Rio Grande Land and Irrigation Company did wrongfully and knowingly cause a change in the current channel of the Rio Grande where it constituted the boundary line between the United States of Mexico and the United States of America, by artificial means, and in direct violation of Article III of the Convention of November 12, 1884, between the two governments, and if said Article III is applied the change in the running channel of the river produces no alteration in the boundary line, which still continues in the old bed of the river.

The Commissioners are of opinion that indemnity should be made for this wrong, but they do not understand that the treaties under which it was organized and under which this investigation was conducted confers upon it jurisdiction over the title to land, damage to property, the control of riparian rights or the enforcing of reparation for wrongs by offenders for changing the channel of the river where it constitutes the boundary.

Nevertheless, as this is a novel case, wherein it appears that some example should be set and a precedent established in order to deter others from similar wrongs, we submit the question to the better judgment of our respective governments for instructions as to further proceedings.

Upon receipt of the report of the commission by the Department of State of the United States, it was referred to the Attorney-General of the United States, who, under date of May 16, 1907, replied as follows:

The boundary convention of 1889 with Mexico gives to the International Boundary Commission exclusive jurisdiction to decide the differences and questions growing out of natural or artificial changes in the beds of the Rio Grande and Colorado rivers where they form the boundary line between the United States and Mexico. The authority of the Commission under that treaty is restricted to the determination of questions respecting the boundary alone, and does not extend to the adjudication of private rights and liabilities. The Commission has found here, within its jurisdiction, that the American Rio Grande Land and Irrigation Company, by the construction of its works changing the channel of the river, violated the stipulations of that treaty, which refers to and incorporates the stipulations of earlier treaties.

Both Commissioners having agreed to this finding or decision, their judgment is binding upon both countries by the express provision of Article VIII of that treaty. Manifestly the Commission is *functus officio* in this matter, and the question is, how can their decision be carried into effect?

The question of suspending the construction of prohibited works, which is authorized and directed by the treaty, does not arise here, because it appears from the report of the joint engineers that the work had progressed so far as to be beyond control.

As to indemnity for injuries which may have been caused to citizens of Mexico, I am of opinion that existing statutes provide a right of action and a forum. Section 563, Revised Statutes, clause 16, gives to district courts of the United States jurisdiction "of all suits brought by any alien for a tort only in violation of the law of nations or of a treaty of the United States." The act of August 13, 1888, amending and superseding earlier laws (25 Stat., 433, sec. 1), gives to the circuit courts of the United States "original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity * * * in which there shall be, * * * a controversy between citizens of a State and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid [\$2,000]."

As to the public tort, so to speak—that is, the injury to Mexico in respect to the boundary line by changing the channel of the river—I incline to the view that a treaty of the United States, which is a part of the supreme law of the land, having been violated, a remedy exists to redress that wrong. The United States owes the duty and has the right of vindicating the treaty. It can hardly be doubted that in a proper case calling for prevention the United States may proceed by bill in equity to obtain an injunction, and that in a case like the present, where the prohibited thing has been done, the United States may proceed in the same way to obtain mandatory relief in some appropriate form to compel the restoration of the *status quo ante*. I find provision for this

course in the act of 1888, already referred to. That act gives jurisdiction to the circuit courts of the United States of all suits of a civil nature at common law or in equity in which the United States are plaintiffs or petitioners. I am of the opinion that the limitation of jurisdictional amount in that act does not apply to such suits.

The Secretary of State then wrote the Attorney-General:

In reply I have the honor to say that, under all the circumstances, the Secretary of State is of the opinion that it is desirable to institute and maintain a suit against the offending corporation to compel the restoration of the river channel as it was. The magnitude of the pecuniary interests involved appears to the Secretary of State to be quite unimportant as compared with the observance of good faith on the part of the United States and the public evidence that will be given of the purpose of the Government to insist upon the observance by citizens of the United States of the treaty with Mexico as a part of the supreme law of the land.

Accordingly the Department of Justice, through the United States Attorney for the Southern District of Texas, filed a bill in equity against the irrigation company, setting forth the above facts, in which it alleged that the action of the company was a violation of the provisions of the treaties above referred to and contrary to the statutes and to international law, and "that such wrongful and unlawful diversion and change in the channel of said Rio Grande by defendant, aforesaid, forming as it then did the natural-boundary line between the two said countries, established and fixed by treaty, even though the boundary itself be not thereby changed, constitutes an act in contempt and in violation of the sovereign authority and power of the two said governments." The bill further alleged:

That by virtue of the terms and effect of existing treaties the two said governments, and particularly the Government of the United States of America, complainant, became obligated, and all persons, corporations and inhabitants within its territorial limits, particularly the American Rio Grande Land and Irrigation Company, defendant, became similarly obligated, to vindicate, maintain, and continue in full force and effect each and every provision, duty, obligation and requirement set out or implied in the said existing treaties. That by the force and effect of law and the said treaties, complainant, the United States of America, and the said defendant became especially obligated to recognize and maintain the Rio Grande as the boundary line between the two countries, as in the treaties declared.

The bill then prayed that "In recognition of the obligations and duties imposed upon complainant, the United States of America, by its treaties with the United States of Mexico, and particularly its obligation

to maintain the fixed international boundary lines * * * in its natural course and position, and because of its wrongful and unlawful change and diversion in the course and current of the entire flow of the water of said river by said defendant company," the court compel the defendant to restore the river to its original bed and to make restoration of the *status quo ante* in all other particulars as nearly as possible as it existed at or before the time of the diversion of the river. The bill further prayed that, if it should appear to be practically impossible to make such restoration, then the court should decree in the alternative that the defendant: (1) convey to the owners of the Mexican lands which had been damaged, all the land belonging to the defendant that was "cut off" or cast upon the southern banks of the Rio Grande by the diversion; (2) pay to the owners of the Mexican lands a sum to cover the damages sustained by them; (3) reimburse the United States for the costs and expenses incident to surveying and marking the international boundary line represented by the former bed of the Rio Grande before the diversion; and (4) pay to the United States a further sum as a penalty for violating the provisions of the treaties.

The irrigation company confessed judgment upon the bill, but pleaded that it had become impossible to restore the Rio Grande to its original bed and prayed the court to decree the alternative relief asked in the bill.

The case was heard upon bill and answer and the alternative relief granted by the following decree dated December 5, 1911:

DECREE

IN THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT
OF TEXAS, BROWNSVILLE DIVISION.

In Equity. No. 41.

THE UNITED STATES, ET ALS., *Complainants*,

vs.

THE AMERICAN RIO GRANDE LAND & IRRIGATION COMPANY, *Defendant*

On this 5th day of December, 1911, at Brownsville, Texas, in said district, in open court, being a day of the regular term of said court, came the United States of America, complainant, by its attorney, Lock McDaniel, for said Southern District, and its co-complainant, Señor Don Adelberto A. Arguelles, Trustee, by his attorney, R. E. Holland, and the American Rio Grande Land & Irrigation Company, defendant, by its attorney, DuVal West, Esq., and submitted said cause for hearing upon the complainants' bill and defendant's answer.

Upon due consideration thereof, it is ordered, adjudged, and decreed:

First.—That defendant, American Rio Grande Land & Irrigation Company, do convey to the complainant, Señor Don Adelberto A. Arguelles, Trustee, by warranty deed, for the benefit of all of the owners of lands situated in Mexico damaged by the unlawful diversion of the Rio Grande, all that tract or parcel of land belonging to said defendant company that was "cut-off" or cast upon the southern bank of the Rio Grande by said unlawful diversion, being situated in Hidalgo County, Texas, forming part of the Llano Grande grant of land and the Capisallo Land District, containing 246.56 acres, more or less, particularly described as follows:

Survey begins at a mesquite post marked "K," on the South bank of the Rio Grande, and near what was the West Bank of that River before the cut-off was made; said mesquite post lying in the Eastern portion, in the north extreme eastern portion of said Banco. Said post is connected with the Capisallo base line of said American Rio Grande Land & Irrigation Company by the following courses and distances:

Beginning at a point on said base line 1,405.93 ft. north of zero of the zero point, thence following the meanders of the North bank of the Rio Grande River by the courses and bearings, N. 78 de. 05' E. 826.09 ft. N. 67 de. 39½' E. 2099.58 ft. N. 63 de. 48½' E. 1305.24 ft. N. 68 de. 04' E. 1492.64 ft. N. 70 de. 19½' E. 1478.22 ft. N. 77 de. 13½' E. 322.80 ft. S. 81 de. 18¼' E. 1037.90 ft. S. 46 de. 07¼' E. 1206.52 ft. S. 83 de. 10½' E. 325.06 ft. S. 4 de. 14' W. 520.71 ft. thus establishing the position of the mesquite post above described.

Now starting from said mesquite post as the point of beginning, and following the meanders of the old river bed the said Bank is bounded as follows:

South 30 de. 55' W. 1878.55 ft. S. 44 degrees 40' W. 717.00 ft. S. 56 de. 20½' W. 845.74 ft. S. 64 de. 32½' W. 551.43 ft. S. 77 de. 35¾' W. 1600.01 ft. S. 77 de. 29' W. 1699.99 ft. S. 77 de. 31¼' W. 815.60 ft. N. 75 de. 02' W. 588.68 ft. N. 5 de. 05¾' W. 1618.90 ft. N. 37 de. 23¼' E. 911.47 ft. N. 78 de. 06¼' E. 604.48 ft. S. 57 de. 19' E. 606.84 ft. S. 43 de. 55' E. 551.37 ft. S. 35 de. 09' E. 604.81 ft. N. 84 de. 22' E. 833.84 ft. S. 83 de. 22¾' E. 193.15 ft. N. 73 de. 38¾' E. 857.92 ft. N. 45 de. 33½' E. 673.11 ft. N. 52 de. 01' E. 1355.12 ft. N. 27 de. 02' E. 529.09 ft. N. 9 de. 01½' E. 705.50 ft.; to a point at the most northern point of this Banco on the southern bank of the said Rio Grande River. Thence with the meanders of the Rio Grande S. 61 de. 58¾' E. 437.98 ft. S. 67 de. 10¼' E. 302.18 ft. S. 77 de. 57' E. 618.80 ft. to the place of beginning, containing in all 246.570 acres of land more or less.

All that portion of the land lying between the approximate said line of the old river bed as shown by the polygon NOPQRSTUVWXYZ, and the circuit lines of the Banco above described and containing in all one hundred and twenty (120) acres of land more or less, making an aggregate total of 1366.57 acres.

Second.—That defendant, the American Rio Grande Land & Irrigation Company do pay unto the complainant, Señor Don Adelberto A. Arguelles, Trustee, Five Thousand Dollars for the benefit of all the owners of Mexican lands so damaged, and particularly for the benefit of: Lic. Joaquin Arguelles, Lic. Jose Arguelles, Senorita Consuelo Arguelles, Don Manuel Cantu and Senores Desiderio Cantu, Ignacio Cantu, Emilio Zamora, Felicitas Garcia, Primitivo Hinojosa, Reducindo Olivares, Geronimo Bazan, Ignacio Castaneda, Jorge Cantu, Julian

Cantu, Natividad Cantu, Jose Angel Hernandez, Santos Cantu, Baltazar Lopes, and the Senoras Manuela Garza Viuda de Cantu, Petra Cisneros Viuda de Hinojosa, Francisca Fraustra Viuda de Bazan, Antonio Rodriguez Viuda de Cantu, and Antonio Garza Viuda de Hernandez. And that the said conveyance of said land and the said payment of said Five Thousand Dollars shall be and constitute a full liquidation and settlement of all damages occasioned to all of the owners of Mexican lands damaged by the unlawful acts of defendant, American Rio Grande Land & Irrigation Company.

Third.—That defendant, American Rio Grande Land & Irrigation Company, do pay to the United States of America, Complainants, the sum of Two Thousand (\$2,000) Dollars to cover costs and expenses incident to surveying and marking the international boundary line now represented by the former bed or channel of the Rio Grande before the unlawful diversion of the stream was made by defendant, as aforesaid.

Fourth.—That as a penalty for violating the provision of the treaties, as aforesaid, in making, by artificial means, the unlawful change, diversion and interference with the natural channel, course and flow of the waters of the international boundary line stream, the Rio Grande, by reason of the wrongful acts complained of, that the defendant company pay to complainant, the United States of America, the sum of Ten Thousand (\$10,000) Dollars and court costs in the sum of Two Hundred (\$200) Dollars.

W. T. BURNS,
Judge.

THE USE OF BALLOONS IN THE WAR BETWEEN ITALY AND TURKEY

In a newspaper dispatch of March 21st, it is stated that the Italian forces have been dropping explosives from dirigible balloons upon Turkish forces, and that a bomb was dropped from a balloon over the town of Zanzour some fourteen miles west of the city of Tripoli; that the bomb fell into the street, killing four persons and wounding ten others, all of them noncombatants.

This item, whether true or not, calls attention to the possible use of balloons in warfare, and has given rise to a discussion whether the Italian forces are justified in dropping explosives from balloons. Whether balloons should be used in the prosecution of hostilities is a question which will not be discussed at present. The following paragraphs will be devoted to a brief examination of the law involved and the applicability of the Declaration, adopted by the First Hague Conference and renewed by the Second, forbidding the dropping of explosives from balloons. The First Hague Conference adopted the following declaration: "The contracting Powers agree to prohibit, for a period

of five years, the launching of projectiles and explosives from balloons, or by other new methods of a similar nature."

It is provided, however, that the Declaration shall be only binding upon the contracting parties in case of war between two or more of them, and that it is not binding against a non-contracting Power. This Declaration was signed by Turkey, but does not appear to have been signed by Italy. In any case, limited to a period of five years, it expired September 4, 1905, approximately two years before the meeting of the Second Hague Conference. The Second Hague Conference renewed the Declaration "for a period extending to the close of the Third Peace Conference." In view of the alleged actions of Italy, it is advisable to quote a portion of the Declaration which is in point: "The present Declaration is only binding on the contracting Powers in case of war between two or more of them. It shall cease to be binding from the time when, in a war between the contracting Powers, one of the belligerents is joined by a non-contracting Power." It is thus seen that the Declaration can be of no effect, unless it be a moral one, upon non-contracting Powers, and that contracting Powers are freed from the obligation in case of a war with a non-contracting belligerent. This Declaration, like its predecessor, was signed by Turkey, but it was not signed by Italy. In view of these circumstances, Italy is free to employ dirigible balloons and to drop projectiles upon Turkish soldiers, and to use the balloons as an instrumentality of warfare in any and all ways not forbidden by the laws of war. Turkey signed the Declaration, but as Italy is not a party to it, it is evident that by the express language of the Declaration, it is not binding upon Turkey in the war with Italy. Therefore, neither party is, during the present war, bound by the terms of the Declaration.

It is necessary, however, to examine the Convention Respecting the Laws and Customs of War on Land, and the regulations annexed thereto, adopted by the Second Hague Conference, because Italy and Turkey are signatories of it and it contains an article which has a direct bearing on the present question. Thus, Article 25 of the Convention of 1899 states: "The attack or bombardment of towns, villages, habitations, or buildings which are not defended is prohibited." This article was revised by the Second Hague Conference to read as follows: "The attack or bombardment, *by whatever means*, of towns, villages, dwellings, or buildings which are undefended is prohibited." It is thus seen that Article 25 of the Convention of 1899 was modified in 1907, and the pro-

ceedings of the Second Hague Conference show that the modification was introduced for the express purpose of prohibiting belligerents from bombarding undefended towns, villages, etc., by means of projectiles from balloons.

An interesting discussion arose in connection with the Belgian proposition to renew the Declaration of 1899. The Russian delegation proposed a project which is immaterial for the present discussion. The Italian delegation proposed the following articles: "1. It is prohibited to discharge projectiles and explosives from balloons which are not dirigible and manned by a military force. 2. The bombardment by military balloons is subjected to the same restrictions accepted for land and naval warfare in all ways which are compatible with this new mode of combat." It was suggested by the French delegation that the Italian proposition should be considered in connection with Article 25 of the Regulations Respecting the Laws and Customs of War on Land, and that it was only necessary to add to the text of the article the expression "by whatever means" in order to prevent the bombardment by balloons of undefended cities, villages, etc. After much discussion, the French view prevailed, Russia and Italy withdrew their amendments, and the clause proposed by the French delegation was, without dissent, added to Article 25. (*Deuxième Conférence de la Paix, Actes et Documents*, Vol. I, pp. 104-106.) Both Italy and Turkey signed, without reservations, the convention to which the regulations were annexed, and are therefore bound by Article 25.

In this connection Article 27 of the same convention should be considered: "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes." In view of the discussions in the Conference, it would appear, therefore, that the belligerents have deprived themselves of the right to bombard "by whatever means" undefended cities, etc., and that in permissible sieges and bombardments certain classes of property are to be protected from the effects of war, as far as this is possible. It therefore follows that while either belligerent may use balloons, they must not launch projectiles upon undefended cities, towns, etc., and in sieges and bombardments of fortified cities and towns, unoffending property of the kind mentioned in Article 27 must be spared as far as possible.

* THE CONVENTIONS ON MARITIME LAW

On January 18 last the Senate of the United States advised and consented to the ratification of the Convention for the Unification of Certain Rules of Law regarding Assistance and Salvage at Sea¹ which was signed at Brussels September 23, 1910, by 54 delegates to the International Conference on Maritime Law representing 25 Powers, namely: Germany, Argentine, Austria, Hungary, Belgium, Brazil, Chile, Cuba, Denmark, Spain, United States, France, Great Britain, Greece, Italy, Japan, Mexico, Nicaragua, Norway, Holland, Portugal, Roumania, Russia, Sweden and Uruguay.

The treaty as signed is the same as that drafted at the nineteen hundred and nine session of the conference and commented upon editorially in our April, 1910, number, page 412, and in our January, 1911, number, page, 192, with the exception of apparently immaterial verbal changes in or additions to Articles 6, 7, 9, 16 and 18.

In view of the lengthy comment already made on this convention, in previous numbers of the JOURNAL, it will be sufficient at this time to supplement what has already been said by the following extract from the report of the American delegation to the Secretary of State which will serve to sum up the effect of this convention on American law:

At the opening of the conference we stated that we were authorized to sign the convention relating to collisions with certain reservations and that we were authorized to sign without reservations the convention relating to salvage. At the same time we stated that under the Constitution of the United States of America no treaty can become effective until approved by the Senate.

On September 23, 1910, we signed the convention relating to the law of salvage, making one reservation as follows:

The government of the United States of America declares that it reserves the right to adhere to said convention and to denounce it for the insular possessions of the United States of America.

* * * * *

The convention on salvage makes few changes in our own or the British law except that article 5 provides that "remuneration is due notwithstanding that the salvage services have been rendered by or to vessels belonging to the same owner." This provision will permit the officers and crew of a salving vessel to recover for their services notwithstanding identity of ownership. It will also affect the right of subrogation of underwriters. The provision would, of course, apply only in a limited number of cases; but we deemed the provision just and unobjectionable.

¹ Printed in SUPPLEMENT, 4:126.

Article 9 contains a reasonable provision for salvors of human life, limiting the recovery, however, to cases where property also has been salvaged.

Article 10 prescribes a limitation period of two years for bringing suits for salvage.

On the same day, September 23, 1910, the Convention for the Unification of Certain Rules in regard to Collisions was also signed by the delegates of the same countries. This convention, however, has not as yet been approved by the Senate. As compared with the draft prepared at the session of 1909 of the conference, the signed convention contains certain modifications or additions to Articles 1, 10, 14, 16, and an "additional article" suspending the effect of Article 5 "until the high contracting parties shall have arrived at an agreement on the subject of the limitation of liability of shipowners."

As the printed report of the American delegation may not be available to all of our readers, and as the convention relating to collisions, if ratified, will change a well-settled rule of admiralty law in this country, it may not be out of place to reprint here certain extracts from this report:

At the opening of the conference we stated that we were authorized to sign the convention relating to collisions with certain reservations. * * * These reservations are as follows:

The delegates of the United States of America to the International Conference on Maritime Law deem it their duty to demand that entry be made in the protocol relating to the international conventions for the unification of certain rules in the matter of collisions, that said delegates sign said convention in the name of the United States only under the following reservations:

1. The provisions of article 4 of said convention shall not affect the operation or enforcement of the act of Congress entitled "An act relating to navigation of vessels," etc., approved February 13, 1893, commonly known as the Harter Act.

2. The provisions of articles 1 and 4 of said convention shall not create in the United States a right of action for damages caused by death until such provisions shall have been supported by appropriate action of the Congress of the United States.

3. The provisions of article 6 of said convention shall not in any way affect legal presumptions created by the laws of the United States.

4. The provisions of said convention with respect to fault and damages, as well as remedies, shall be applicable in the United States only in the courts of admiralty and maritime jurisdiction.

On September 23, 1910, we signed the convention, subject to the foregoing reservations and subject also to the reservation which we made with regard to the convention on salvage, as follows:

The government of the United States of America declares that it reserves the right to adhere to said conventions and to denounce them for the insular possessions of the United States of America.

* * * * *

The most important change in our law made by the convention on collisions is the substitution of several liability in proportion to the gravity of fault for joint liability to be shared equally by the *tort feorsors* as between themselves. Article 4 provides that—

If two or more vessels are in fault, the liability of each vessel is in proportion to the degree of the faults respectively committed, provided that, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or, if it appears that the faults are equal, the liability is apportioned equally.

This article provides further that damages caused to cargoes or property of crews, passengers, or other persons on board a vessel are to be borne by the vessels in fault "in the above proportions."

In cases of mutual fault our courts of admiralty divide the damages arbitrarily in equal parts, the vessel slightly at fault and the vessel grossly at fault bearing the same burden.

In our report to the Secretary of State of the proceedings of the conference in 1909 we stated at length our reasons for recommending the adoption of a provision which apportions responsibility according to the degree of liability. We were convinced that proportional liability was not only more rational than our present rule, but was also thoroughly practicable. We expressly limited the effect of the new rule, however, so that it should be applied in the United States not in the common law courts, but only in courts of admiralty and maritime jurisdiction.

The extension of the rule of proportional liability to cargo damage undoubtedly limits the existing rights of cargo owners, who, under our present law in case of a collision, due to the fault of two vessels, may recover the whole of their damages from the noncarrying vessel even though the carrying vessel is protected from liability by the Harter Act. Cargo owners are thus able to take advantage of an anomalous situation. If a cargo is lost or damaged through a collision resulting from a fault or error in navigation or in the management of a carrying vessel, the owner of which has used due diligence to make her seaworthy, the Harter Act deprives the cargo owner of any remedy. If the loss results from the negligence of the carrying vessel, combined with the negligence of a noncarrying vessel, the cargo owner may collect his whole damage from the noncarrying vessel, which pays not only for its own negligence, but for that of the carrying vessel, obtaining, however, under the decisions of the Supreme Court, notwithstanding the Harter Act, contribution from the carrier. The result is that if a carrying vessel does all the damage it pays nothing; if it does part of the damage it pays one-half.

As the Harter Act, which we assume defines the policy of the United States, relieves shipowners from direct responsibility for injury to cargo, it seems logical that shipowners should be relieved from indirect responsibility.

Doubt having arisen as to the effect of articles 4 and 10 of the convention on the Harter Act, we made the reservation numbered 1. It was impossible to preserve the rule of our courts making the noncarrying vessel liable in the first instance for the whole amount of the damage caused by the cargo. Such a rule would contravene the underlying principles of the convention.

The second reservation, which provides that "Articles 1 and 4 of the convention shall not create in the United States a right of action for damages caused by death until such provision shall have been supplemented by appropriate action of the Congress of the United States," was necessary, as Congress has not yet legislated on this subject, and we deemed it our duty not to seek to establish a remedy by treaty when the matter was already before Congress for action.

The third provision, with regard to presumptions created by the laws of the United States, is not of great importance, as there are few statutory or other legal presumptions relating to collisions in our law. There are many such presumptions, however, in the laws of other countries, and it was for that reason that the conference adopted article 6, which provides that "all legal presumptions of fault in regard to liability for collision are abolished."

Article 5, which establishes liability in case of collision caused by the fault of a pilot, even though compulsory, brings the general law into harmony with our own.

Article 7 prescribes a limitation period of two years for bringing suits for collision, which we deemed a reasonable provision.

MARYLAND V. WEST VIRGINIA

The Articles of Confederation of July 9, 1778, finally adopted in 1781, declared, in the ninth article, that the "United States, in Congress assembled, shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever." The method of settling disputes was by means of a temporary court of commissioners or judges chosen by consent of the parties representing the States, or from a list of thirty-nine commissioners, of whom not less than five should sit and determine the case. The Federal Convention of 1787 rejected the method of temporary courts composed of commissioners or judges, for one Supreme Court, which, among other powers, was invested, by Article 3, Section 2, with the power to try and determine "controversies between two or more States."

Since the establishment of the Supreme Court, thus provided for by the Constitution, there have been many suits between the States adjudicated by it. Boundaries between nations are regarded as political questions; boundaries between States of the American Union as judicial questions; and the Supreme Court, possessing original jurisdiction in cases to which States are a party, has frequently been called upon to determine questions of boundary. A consideration of these various cases and of the principles of law invoked by the parties and laid down by the Court, would form an interesting article, as it would show not merely

the extent and variety of controversies between States which may be submitted to judicial determination, but that there is comparatively no greater difficulty in the submission and decision of the ordinary controversies between States than there is between the submission and determination of corresponding suits between individuals. Nations are averse to a leap in the dark, and such an article would show that the experience of the United States in the judicial determination of controversies between States makes manifest that nations can safely do in the future what States have done in the past, and that the judicial determination of justiciable controversies by the fearless and impartial application of principles of justice in no way injures the national honor of the parties to the dispute.

A recent instance in point is the case of the State of Maryland versus the State of West Virginia¹ (217 U. S. 1), decided at the October term of the Supreme Court in 1909. The principles involved in the case were simple, although the facts were complicated. For many years there was a dispute between Maryland and that part of Virginia which now forms a part of the State of West Virginia. It was claimed by the State of Maryland that the Deakins Line of 1787 did not accurately conform to the terms of the charter of the State of Maryland, as appeared from a subsequent scientific survey, and, on the part of West Virginia, that its own boundary extended to the north side of the Potomac River. The Supreme Court found that although the Deakins Line, run in or about the year 1788, was inaccurate, it had been, nevertheless, acquiesced in by the States and by their respective citizens, and that long acquiescence of the line as the boundary was conclusive upon the States. The court further found that the Charter of Charles I to Lord Baltimore, in 1632, embraced the Potomac River, the soil under it, and the islands therein to the high-water mark on the southern and Virginia shore, and that, therefore, West Virginia as the successor of Virginia in this part of the territory, had no right, title or interest in or to the Potomac River. The language of the court is measured and dignified as becomes a decision affecting the rights of States. Thus, Mr. Justice Day, speaking for the court, said:

Upon the whole case, the conclusions at which we have arrived, we believe, best meet the facts disclosed in this record, are warranted by the applicable principles of law and equity, and will least disturb rights and titles long re-

¹ Printed in Judicial Decisions, p. 517.

garded as settled and fixed by the people most to be affected. If this decision can possibly have a tendency to disturb titles derived from one State or the other, by grants long acquiesced in, giving the force and right of prescription to the ownership in which they are held, it will no doubt be the pleasure, as it will be the manifest duty, of the law-making bodies of the two States, to confirm such private rights upon principles of justice and right applicable to the situation.

The court thereupon directed that a decree be entered settling the rights of the States to the western boundary in accordance with Deakins Line, and that commissioners be appointed to locate and establish said line. Should the respective States fail to agree upon three commissioners to run the line and to present a report, in accordance with the court's directions, the court stated that it would itself appoint commissioners and enter a decree in conformity with their decision.

SECRETARY KNOX'S VISIT TO CENTRAL AMERICA

On February 23d Secretary of State Philander C. Knox sailed from Key West on the Cruiser *Washington* upon an official visit to the Latin-American republics surrounding the Caribbean Sea and the Gulf of Mexico. The purpose of his journey was very similar to that of Secretary Root's trip to South America in 1906 — to convey to the people and the governments of the Central American States the formal testimony of the continued good will of the United States, to cement the ties of traditional friendship between them, and to promote an increasing commercial intercourse. The visit of the Secretary was well timed, in view of the early completion of the Panama Canal, and one of his main objects as revealed in his series of addresses, was to call the attention of the states directly bordering upon the Canal to the new opportunities for the development of our trade relations which will follow the re-alignment of international commerce, sure to follow the successful inauguration of this great interoceanic waterway. In announcing the visit of Secretary Knox, its purpose and significance were made plain in the following statement issued from the White House on February 10th:

The relations of the United States to the Spanish republics surrounding the Caribbean Sea and the Gulf of Mexico are of the utmost importance to us, in view of our interests and responsibilities in that region. The President thinks it will be of great assistance, in solving the diplomatic problems that are presenting themselves from day to day, if we manifest our friendly interest in these, our neighboring republics, by a visit to them of the Secretary of State.

By creating the closer relation and acquiring the more exact information that must come from such conferences as he will be able to have in the capitals of these republics with the heads of their governments, he will enable our government to deal with existing questions much more effectively. This will be the first time that an American Secretary of State has visited those countries.

Secretary Knox's first stop was at Panama, where he arrived on February 27th. He was cordially received by the Acting President, Señor Chiari, and by an esthustiasitic concourse of people. In his speech on this occasion, Mr. Knox expressed in admirable terms the sentiments of good will which exist in the United States towards all her South American sisters; dwelt upon the new bond of union which the Panama Canal will create; and in particular he emphasized the bearing of the Monroe Doctrine upon the future relations between North, Central, and South America. The Panama speech was so tactful in phrase, and so comprehensive in scope, as to make it the keynote of all of the Secretary's addresses on this journey; and it is highly appropriate to reproduce it in full:

The President of the United States believes that the early completion of the Panama Canal should mark the beginning of closer relations to all Latin America and especially to the Caribbean littoral, as well as the relations of these countries to each other, and has sent me hither as a bearer of a message of good will to our sister American republics. It is the President's desire that I might personally meet your most hospitable peoples, might see for myself your beautiful countries with their boundless resources and economic possibilities, to the end that such direct personal knowledge, understanding and appreciation might result in mutual advantage and in co-operation for the development of all our countries. Responding to the hospitality of the country which has first and so generously received me and with which the relations of my country are so cordially intimate, I take this opportunity of assuring all the American republics that the purpose of the United States toward them is that we should live in amity and essential harmony and that we desire only that more peace, more prosperity, more happiness and more security should come into and become part of their individual and national lives.

While it is entirely clear to those who have fairly and intelligently considered the history of the relations of the United States to the other American republics that our policies have been without a trace of sinister motive or design, craving neither sovereignty nor territory, yet it is true that our motives toward you have not always been fortunately interpreted either at home or faithfully represented by some of our nation who have resided in your midst.

When the canal is opened and the ships of all the countries of the world come sailing through these Carib seas, the peculiarity of our position with its special requirement will be accentuated and the wisdom of that doctrine be confirmed again and specially. It serves admittedly your interests as much as ours. Even

now it is a great bond between us. In its future amplification I perceive it will be a common heritage binding together the nations of this hemisphere with a force no power can break, and while it has in Providence been given to us of the North to state and interpret it, it has never been invoked to the detriment of the people of the South or operated to their hurt.

In my judgment the Monroe Doctrine will reach the acme of its beneficence when it is regarded by the people of the United States as a reason why we should constantly respond to the needs of those of our Latin-American neighbors who may find necessity for our assistance in their progress toward better government or who may seek our aid to meet their just obligations and thereby to maintain honorable relations to the family of nations. Great as will be the glory of having physically divided a hemisphere, a greater glory will be to have contributed to the unity, happiness and prosperity of its people.

After an inspection of the Canal and a series of social and official functions, Secretary Knox and his party sailed for Port Limon, Costa Rica, arriving there March 1st; his reception at San José, the capital, was equally cordial.

At a banquet tendered by the President of the Republic Secretary Knox made an address, which took its key-note from the fact that he was speaking "in the City which is the home of the Central American Court of Justice * * * the most perfect type of an international court of arbitral justice." The main portions of his speech are given:

It is given to few countries to make the just boast that within her borders the school teachers outnumber the soldiers and that resting upon her bosom in the very center of America is the first perfect type of an International Court of Arbitral Justice.

The attitude of the Government of the United States toward the peaceful settlement of international disputes, of which this court forms a model, has been consistently maintained since the foundation of our Government, as is evidenced by the treaty of Ghent. The attitude of the Republic of Costa Rica has likewise been consistent and is amply evidenced by the course adopted for the settlement of the century old boundary dispute with Panama. I repeat, Mr. President, that the people of Costa Rica may justly felicitate themselves that in their very midst is the home of the Central American Court of Justice, the one tribunal before which one nation may bring another, yes, before which an individual may bring a nation to determine before the bar of impartial justice the differences that exist between them. My Government, and I am sure the Government of Mexico, feel proud of the part played by them in the Central American Peace Conference, convoked under their auspices, out of which grew this international forum, which is the prototype of the court it has long been the desire of the United States to see established by the nations of the earth. In this connection, Mr. President, let me express the feeling of profound satisfaction that the people and Government of the United States entertain, not only because of the rapidly increasing prosperity of Costa Rica, but because

of her love for peace, because of the respect she inspires in the family of nations, because she has laid the foundations of perpetual freedom upon the eternal rock of justice and occupies an exceptional and enviable position among the American Republics due to the general distribution of property among her people, and because of the constantly increasing intimacy and friendliness between her people and our own.

It is but a short time, Mr. President, until at Panama a new highway of commerce will be opened to the world. That event, so conspicuous and significant, will remove the countries of the Caribbean Sea from their comparative isolation and place them upon the greatest commercial highway on the globe, a highway from the Northern to the Southern, from the Western to the Eastern world. The republics of this hemisphere will be thrown into a new day and a new condition. It would be folly to enter that new day without a proper conception of its opportunities and possibilities for our common good. We should go into the new epoch as befits it, with new aspirations and enthusiasms and with greater promise. The casual relations which once marked our intercourse are now happily not casual, but they must be closer and more friendly still, so close indeed that as we labor to better human conditions this common end will be a bond of trust and hope.

I bear to you then, not only a message of good will but one bespeaking a mutual understanding and union in aspiration and effort toward furthering the progress of the western world through deeds of reciprocal helpfulness.

The free and equal republics which have established themselves upon this hemisphere have a singular harmony of destiny, and that is, to bring their common form of government to the highest point of efficiency for the maintenance of popular rights. The greatest strength of these republics whose heritage is so wonderful lies in unity of aim and effort.

While we will all be more or less in the future as in the past engrossed in questions affecting our internal development and our own acute problems, it is wise to seize every opportunity to impress upon the world and upon ourselves that ours is a Pan-American Union of lofty Pan-American public opinion doing justice and exacting justice, disclaiming ignoble suspicion and putting to scorn international acts of unworthiness when unhappily they may be found among us.

From Costa Rica Secretary Knox went to Nicaragua, and at Managua, on March 6th, was welcomed by President Diaz, whose guest he was during his stay at the capital. The following day was observed as a public holiday. Secretary Knox visited the Congress, where he was formally received, attended a session of the Supreme Court, was the guest of honor at a public reception and ball, and spoke at a banquet.

In his speech at the banquet Secretary Knox served notice that the United States intends to preserve the Central American republics from disintegration within as much as from foreign menace without. He disavowed any desire on the part of the United States for territorial aggrandizement.

The warmth of the Secretary's reception in Nicaragua was emphasized, rather than marred, by some demonstrations of hostility in local newspapers controlled by adherents of the deposed President Zelaya. The Secretary's speech made reference to the American efforts to reorganize the finances of Nicaragua and Honduras, as outlined in the treaties now pending in the United States Senate, and which were referred to in Mr. Knox's address before the American Society for the Judicial Settlement of International Disputes, in the following words:

The logic of political geography and of strategy and now our tremendous national interest created by the Panama Canal make the safety, the peace and the prosperity of Central America and the zone of the Caribbean of paramount interest to the United States. Thus, the malady of revolutions and financial collapse is most acute precisely in the region where it is most dangerous to us. It would not be sane to uphold a great policy like the Monroe Doctrine and to repudiate its necessary corollaries and neglect the sensible measures which reason dictates as safeguards.

The next visit was to Salvador, where Mr. Knox arrived at Acajutla on March 10th, and proceeded by special train to San Salvador, where he was received by the President of the Republic, Dr. Manuel A. Araujo. At a state dinner on the same evening the Secretary spoke at length, and portions of his remarks were plain-spoken and significant. He said:

The supreme purpose of my visit is to show that there is no justification and no reason for the prejudice and misunderstanding existing between the peoples of the United States and Central America. Both are sorely in need of the truth. The Central Americans desire their high civilization, lofty purpose and hospitality to reach the United States through unpolluted channels; and the truth of the motives of the United States in Central America should reach here without wicked perversions.

The opening of the Panama Canal shortens by 10,000 miles the water route between Acajutla and New York, which should be naturally one of the chief markets for the products of Salvador. When Central American products become popularized in the United States, trade with our Caribbean neighbors will grow to an enormous extent.

The people of the United States have been too ignorant of their southern neighbors and their undeveloped resources. Friendship and peace will result from the reciprocal dependence of the countries upon each other's products, sympathies, and assistance.

From Salvador the Secretary proceeded to Guatemala, arriving at San José on March 14th, and he spent the next two days in Guatemala City, where he was welcomed by six thousand school children, bearing the flags of the two republics. The University of Guatemala conferred

upon him the degree of Doctor of Laws. From Guatemala the Secretary proceeded to Honduras, arriving at Puerto Barrios on the 17th, where he again went aboard the Cruiser *Washington*. He was met at the seaport by members of the Honduran cabinet and the Chief Justice, who made the two days journey from the capital on mules. A brilliant reception was given by the Secretary on board the cruiser. On March 22d he arrived at Caracas, Venezuela, where he spent the two following days, and was the recipient of honors and attentions not surpassed by those at any previous stage of his journey. His subsequent itinerary includes visits to Porto Rico, on March 28-30; Santo Domingo, on March 31-April 1; Haiti, on April 3-4; Jamaica, on April 8; Havana, April 10-13; and he is due to arrive at Key West on April 23d. A visit to Mexico, scheduled in the Secretary's original itinerary, was omitted because of the disturbed political conditions in that republic.

As the JOURNAL goes to press the Secretary has but partially completed his mission of good-will and peace. There can be no doubt that his message of friendly sympathy and appreciation has been well received. His visit has been a continual triumph, and it may be confidently predicted that it will mark an important date in the relations between Central America and the United States.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Ann. Vie Int.*, Annuaire de la Vie Internationale, Brussels; *Arch. dipl.*, Archives Diplomatiques, Paris; *B.*, boletin, bulletin, bollettino; *B. P. U.*, bulletin of the Pan-American Union, Washington; *Clunet*, J. de Dr. Int. Privé, Paris; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain: Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *L'Int. Sc.*, L'Internationalism Scientifique, The Hague; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil générale de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs G.*, Reichs-Gesetzblatt, Berlin; *Staats.*, Staatsblad, Groningen; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain: Treaty Series.

September, 1911.

- 5-8 FIFTH INTERNATIONAL CONFERENCE ON STATE AND LOCAL TAXATION met at Richmond, Virginia. *American Economic R.*, 1:454.
- 25 INTERNATIONAL ASSOCIATION FOR THE PROTECTION OF INDUSTRIAL PROPERTY held its general assembly at Berne in lieu of the fifteenth congress which was to have met at Rome. *Dr. d'Auteur*, 25:30.

October, 1911.

- 4 BELGIUM-NETHERLANDS. Convention relative to the delimitation of the frontiers. *B. Usuel*, October 4.
- 24 BELGIUM-MEXICO. Exchange of ratifications at Mexico of convention signed there December 4, 1909, relative to the exchange of parcels post. *B. Usuel*, October 24. Ditto, additional act, signed August 28, 1911.

November, 1911.

- 2 BULGARIA-TURKEY. Provisional commercial arrangement for one year from November 14, when existing arrangement expires, signed at Constantinople. *Times*, November 3.

November, 1911.

- 3 CENTRAL AMERICAN CONGRESS OF STUDENTS met at San Salvador. *P. A. U.*, 33:1200.
- 4 CHINA. Edict issued giving nineteen bases for the constitution. *Times*, November 4; *Spectator*, January 6, Sun Yat Sen; *Wu Ting Fang*, The Chinese Republic, *Independent*, 71:1439; *Dr. Sun*, *do.*, 72:420; *Graybill*, Chinese Revolutionary Methods, *do.*, 72:180; *Bone*, The Revolution in China, *do.*, 71:1332-1337; Peking and the People, *North China Herald*, January 20; Russo-Chinese Relations (A. D. 1224-1912), *Edinburgh R.*, 215:190-212; *Rottach*, L'Armée dans la Révolution chinoise, *R. de Paris*, 19:741, 754; *Nation*, A Republic in China, 94: 153; *Times*, February 12.
- 4 FRANCE—GERMANY. Conventions respecting Morocco and the Congo signed at Berlin accompanied by exchange of notes. Texts in *Mém. dipl.*, 49:601, 620, 681; also in *R. Politique et Parlementaire*, 70:592 *et seq.* See *Cd.* 6010 for the Franco-Spanish convention of October 3, 1904, the notes exchanged between Great Britain and France, October 6, 1904; and the Franco-German declaration of February 8, 1909, all respecting Morocco. *Millet*, L'Oeuvre Marocain, *R. Politique et Parlementaire*, 70: 393; *Feillet*, Après le Traité (avec carte), *do.*, 70:411; *La Dreit de Lacharrièr*, L'Action de la France au Maroc après l'accord franco-allemand (avec carte), *do.*, 71:59; *Barker*, Anglo-German Differences and Sir Edward Grey, *Fortnightly R.*, 91:447-462; *Kann*, Protectorat marocain, *R. de Paris*, 19:876; *Lozano Muñoz*, La zona de influencia española en Larache y el gobierno marroquí; Nuestro Tiempo, 12:5-22; *Lascelles*, Thoughts on the Anglo-German Problem, *Contemporary R.*, 101:1-9; *Spectator*, December 30, The Expansion of Germany; "Strategist," The Blue-Water School and the Late Crisis, *National R.*, 58:713-721; *Mévil*, Some Light on Agadir, *do.*, 59:155-167; *Brooks*, England and Germany, *Forum*, 47:90-100; *Lord Haldane*, Britain and Germany, *Independent*, 71:1382-1386; Great Britain and Germany's "Place in the Sun," *Times*, December 5; *Morel*, The True Story of the Morocco Negotiations, *Nineteenth Century and After*, 71:233-251; *Johnston*, The Aftermath of Agadir, *do.*, 71: 191-200; *Von Bernstorff*, Germany and France, *Outlook*, 100: 123.

November, 1911.

- 5 An international meeting organized by the International Socialist Bureau to protest against war was held at Brussels. *Mém. dipl.*, 49:595.
- 5-12 FIFTH INTERNATIONAL SANITARY CONFERENCE met at Santiago, Chile. *P. A. U.*, 34:21-30.
- 5-12 FIRST CENTRAL AMERICAN MEDICAL CONGRESS met at San Salvador. *P. A. U.*, 33:1011.
- 7-8 CONFERENCE OF AMERICAN SOCIETY FOR JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES met at Cincinnati. *P. A. U.*, 33:1042.
- 10-12 FOURTH FRANCO-GERMAN CONGRESS OF COMMERCE met at Paris. *Mém. dipl.*, 49:387.
- 15 COLOMBIA—FRANCE. Exchange of ratifications at Paris of the convention signed at Bogota, August 5, 1910, additional to the arbitration convention signed December 16, 1908. *J. O.*, November 25.
- 16 FRANCE—UNITED STATES. Convention signed at Washington providing for exchange of postal money orders between the United States and Martinique. *J. O.*, January 1.
- 19 PERSIA—RUSSIA. Diplomatic relations broken off. *Mem. dipl.*, 49:626; The Persian Crisis, *Times*, November 21; *Morrell*, Our Persian Policy, *Nineteenth Century and After*, 71:40-47; *Lynch*, Sir Edward Grey on Persia, *Contemporary R.*, 101:10-16; *R. of Rs.*, Persia, Russia, and *Shuster*, 45:49-53; *Machray*, The Fate of Persia, *Fortnightly R.*, 91:291-302; *Low*, The Most Christian Powers, *do.*, 91:414-426; Views of the Persian Committee, *Times*, November 22.
- 21 FRANCE. Decree regulating aerial navigation. *J. O.*, November 25; *R. General de Dr. Int. Public Documents*, 18:34-40.
- 25 GERMANY—TURKEY. Extension until June 25, 1914, of the treaty of commerce and navigation signed at Constantinople, August 26, 1890. Date of expiration set by treaty February 28/March 12, 1912. *Mém. dipl.*, 49:642.
- 27 GREAT BRITAIN—SWEDEN. Declaration relating to the amendment of treaties of commerce between the two countries, signed at Stockholm. *Treaty ser.*, No. 26, 1911.

December, 1911.

- 1 GERMANY—SWEDEN. Commercial treaty, signed May 2, 1911, becomes effective. *Daily Consular and Trade Reports*, Washington, 15:330.
- 1 INTERNATIONAL OPIUM CONFERENCE opened at The Hague. The convention was signed January 23 by Germany, United States, China, France, Great Britain, Italy, Japan, Holland, Persia, Portugal, Russia, and Siam. *Times*, January 6, 16, 24, February 14. *Mém. dipl.*, 49:660; The Opium Conference, *North China Herald*, 101:845; *Collins*, The International Opium Conference at The Hague, *Contemp. R.*, 101:317-327; *Cd.*, 6038, text, etc. See *Cd.* 4898 for correspondence regarding the International Opium Conference which met at Shanghai, February 1-26, 1909.
- 4 INTERNATIONAL LITERARY AND ARTISTIC ASSOCIATION held a general meeting at Paris in lieu of the thirty-third congress which was to have met at Rome, September 25-27. *Dr. d'Auteur*, 25: 11-14.
- 6 ARGENTINE—SWITZERLAND. Exchange of ratifications at Buenos Aires of treaty of extradition signed at Buenos Aires, November 21, 1906. Text in *B. Rel. Ext.*, 33:349.
- 10 NOBEL PEACE PRIZE. The Peace Prize for 1911 was divided between T. M. C. Asser of The Hague and Alfred H. Fried of Vienna. *Advocate of Peace*, 74:2; *Mém. dipl.*, 49:675.
- 12 INTERNATIONAL. Ratifications deposited at Washington of a convention between Great Britain, United States, Japan, and Russia respecting measures for the preservation and protection of the fur seals in the North Pacific Ocean, signed at Washington, July 7, 1911. *Treaty ser.*, No. 2, 1912.
- 12 INDIA. The coronation Durbar at Delhi was made the occasion of important administrative changes. *Imperial and Asiatic Quarterly R.*, 33:211-217; *Times*, December 13; *Fraser*, The Changes in India, *Nineteenth Century and After*, 71:48-57; *Swami Bâbâ Bhârata*, How King George could win the Hearts of the Hindoos, *do.*, 71:58-74; Indian Administrative Changes, *Geographical J.*, 39:70.
- 14-15 THE SOUTH POLE discovered by Roald Amundsen, a Norwegian. *Independent*, 72:546.

December, 1911.

- 15 RUSSIA—UNITED STATES. Notification by President Taft of the intention to abrogate the treaty of December 18, 1832 (V. this Journal, Supplement, 6:66), *Indep.*, 71:1423; *Clunet*, 39:159-168; *Mém. dipl.*, 49:693; *Roosevelt*, The Russian Treaty, Arbitration, and Hypocrisy, *Outlook*, 99:1045; *Gelberg*, The Russian Consul-General and the Russian Jews, *Fortnightly R.*, 91:543-552.
- 15 ARGENTINE—NETHERLANDS. Exchange of ratifications at the Hague of convention regarding medical aid signed at the Hague, September 29, 1910. *B. Rel. Ext.*, 33:362.
- 15 FRANCE—GERMANY. Convention to regulate the immediate exchange of information along their frontiers in cases of contagious diseases of men or beast goes into effect. *J. O.*, November 15.
- 16 THIRD INTERNATIONAL EXHIBITION OF AERIAL LOCOMOTION opened at Paris. *Times*, December 18.
- 16 GREAT BRITAIN. Maritime conventions act passed. *Chapter 57, Statutes 1 and 2 George V.*
- 21 DENMARK—FRANCE. Ratifications exchanged at Copenhagen of the convention of arbitration signed at Copenhagen August 9, 1911. *R. General de Dr. Int. Public, Documents*, 18:40.
- 29 CHINA. Mongolia declares autonomy. "Russia and Mongolia," *North China Herald*, January 20; *Kergant*, Chine et Russie en Mongolie, *Q. dipl.*, 33:213-226.
- 29 FRANCE—GREAT BRITAIN. Postal arrangement regarding letters exchanged between French Oceania and New Zealand signed at Paris. *J. O.*, December 31. *Treaty ser.*, No. 7, 1912.
- 30 GREAT BRITAIN—GREECE. Exchange of ratifications at Athens of the treaty for the mutual surrender of fugitive criminals, signed at Athens, September 24, 1910. *Treaty ser.*, No. 6, 1912.
- 31 INTERNATIONAL. Close of the period for deposit of ratifications of the declaration signed at Brussels, June 15, 1910, modifying the Brussels General Act of July 2, 1890. Ratifications deposited by Turkey, Netherlands, Great Britain, Denmark, Italy, Spain, Germany, Belgium, Sweden, Russia, Norway, France, Austria-Hungary, Portugal, Liberia, and Persia. *Treaty ser.*, No. 5, 1912.
- 31 FRANCE—MONACO. The convention signed at Paris, November 9, 1865, relative to tariffs and to reports of vicinage expires. *Mém. dipl.*, 50:2; *State Papers*, 55:407.

January, 1912.

- 1 ARGENTINE—BOLIVIA. Direct money order exchange on the basis of the arrangement of Rome inaugurated. *L'Union Postale*, 37:32.
- 1 GREAT BRITAIN. Certain gold and silver coins of the United States cease to be legal tender in the Bahama Islands. Proclamation in *London Ga.*, December 19.
- 1 Postal giro service between Germany, Austria, Switzerland, and Belgium was extended to Luxemburg. *L'Union Postale*, 37:32.
- 3 GREAT BRITAIN—PORTUGAL. Arrangements concluded for fixing the boundary from the district Tête to Mozambique. *Mem. dipl.*, 50:3.
- 3 FOURTH CENTRAL AMERICAN CONFERENCE opens at Managua. *American R. of Rs.*, 45:162.
- 4 INTERNATIONAL CONFERENCE on the liquor traffic in Africa opened at Brussels. *Times*, January 5; *Mém. dipl.*, 50:3.
- 6 FRANCE—ITALY. French law approving the arrangement signed at Paris, June 15, 1910, concerning the protection of young French workmen in Italy and young Italian workmen in France. *J. O.*, January 9.
- 8 BRAZIL—VENEZUELA. Ratification exchanged at Caracas of the arbitration convention signed at Caracas, April 13, 1909.
- 10 AUSTRIA—HUNGARY—SERVIA. Exchange of ratifications at Belgrade of four conventions signed at Belgrade, March 17/30, 1911: Reciprocal extradition, Civil and Commercial Procedure, Consular matters and Successions, Guardianship, etc. *Ministry of Foreign Affairs*, Belgrade, 1912.
- 10 BELGIUM—NETHERLANDS. Declaration relative to delimitation of boundaries signed at Brussels. *B. Usuel*, January 10.
- 16 ITALY—TURKEY. Seizure of the French Steamer "Carthage," and on January 18 the "Manouba," and on January 26 the "Tavignano." *Times*, January 20, 24, 29. *Bagot*, The Reunification of Italy, *National R.*, 58:987; *Platt*, With the Italians in Tripoli, *do.*, 59:118-130; *Mém. dipl.*, 50:41, 57; *Dillon*, Tripoli and Constantinople, *Quarterly R.*, 216:248-257; *Woods*, The Internal Situation in Turkey and the Effect of War upon it, *Fortnightly R.*, 91:334-346; *Barker*, Italy's Policy and Her Position in Europe, *do.*, 91:11-27; *Norton*, Tripoli, *Independent*, 72:26-29; "Master Mariner," The Invasion of Tripoli, *Contemporary R.*, 101:49-55; The Red Sea Blockade, *J. O.*, January 23.

January, 1912.

- 20 ARGENTINE—COLOMBIA. A general arbitration treaty was signed at Washington. *Advocate of Peace*, 74:59.
- 20 GERMANY—GREAT BRITAIN. Ratifications exchanged at Berlin of treaty relating to extradition between certain British protectorates and Germany, signed at Berlin, August 17, 1911. *Treaty ser.*, No. 3, 1912.
- 25 ARGENTINE—PARAGUAY. Rupture of diplomatic relations. *Times*, January 27.
- 30 HUNGARY—UNITED STATES. A copyright treaty was signed at Budapest. *American R. of Rs.*, 45:291.

ADHESIONS.

Conventions of Third International American Conference:

Panama ratified the four conventions: Pecuniary Claims, Naturalized Citizens, International Law, and Patents.

Circulation of Automobiles. Paris, October 11, 1909:

Tunis, *B. Usuel*, January 18.

Barbadoes, Gibraltar, Leeward Isles, Malta, Northern Nigeria, Southern Nigeria, Seychelles, and Sierra Leone. *B. Usuel*, November 17.

The Hague Conventions, 1907:

Japan I-XI, XIII.

Guatemala I-XI, XIII.

Sweden X.

Panama, all except XII, *B. Usuel*, December 3.

The Hague Conventions. Private International Law:

Hungary, Marriage, Divorce, and Guardianship. *B. Usuel*, September 22, 1911.

International Institute of Agriculture, Rome:

Paraguay, *Monit. B.*, January 28.

International Office of Hygiene, Rome:

Portugal, *B. Usuel*, November 21.

Mexico, *B. Usuel*, December 11.

Protection of Literary and Artistic Works, Berlin, November 13, 1908:

Portugal, *Monit. B.*, November 8.

International Convention — white (yellow) phosphorus in match manufacture, Berne, September 26, 1906:

Great Britain for New Zealand, *J. O.*, January 12.

International Convention: Obscene Literature, Paris, May 4, 1910:
Great Britain for Newfoundland and South African Union,
Monit. B., January 28.

Canada. Zanzibar. *B. Usuel*, December 8.

German colonies, *do.*, Russia, *B. Usuel*, December 15.

Norway, *J. O.*, January 12.

International Radiotelegraph Convention, Berlin, November 3, 1906:
Argentina, *B. Usuel*, January 27.

Portugal, *B. Usuel*, November 30.

The Geneva Convention (Red Cross), July 6, 1906:

Salvador, adhered, *Monit. B.*, November 5.

This convention has been ratified by Germany, Austria-Hungary, Belgium, Brazil, Chile, Congo, Denmark, Spain, United States, Great Britain, Honduras, Italy, Japan and Corea, Luxemburg, Mexico, Norway, Netherlands, Portugal, Roumania, Russia, Servia, Siam, Sweden, and Switzerland; and adhered to by Colombia, Costa Rica, Cuba, Nicaragua, Paraguay, Turkey (The Red Crescent), Venezuela and Salvador. *Ga. de Madrid*, December 24.

International Convention — Transportation of merchandise by
railroads:

Bulgaria, *B. Usuel*, November 28.

OTIS G. STANTON.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

UNITED STATES ¹

Arbitration treaties with Great Britain and France, Aug. 3, 1911. Report, with views of minority and proposed committee amendments with appendices. Reprinted with additional matter. 50 p. (S. doc. 98, 62d Cong. 1st sess.) Paper, 5c.

Claims. Report favoring S. 462 for relief of Slavo Ramadanovitch, heir of Marcus Ramadanovitch, alias Radich. Jan. 11, 1912. 2 p. (S. rp. 174.)

———. Report favoring S. 2819 to reimburse certain fire insurance companies amounts paid by them for property destroyed in suppressing bubonic plague in Hawaii in 1899 and 1900. Jan. 23, 1912. 6 p. (S. rp. 228.)

Fur seals and sea otter. Hearings, Jan. 3, 4, 1912, on H. 16571 to give effect to convention between United States, Great Britain, Japan, and Russia, for preservation and protection of fur seals and sea otter which frequent waters of North Pacific Ocean, concluded at Washington, July 7, 1911. 1912. 150 p. *For. Affairs Comm.*

Immigration. Report amending S. 3175 to regulate immigration of aliens to and residence of aliens in United States. Jan. 18, 1912. 2 p. (S. rp. 208.)

Immigration and emigration. Resolutions, views of southern governors, newspaper articles, and hearings before Committee on Immigration and Naturalization of House of Representatives relative to excluding undesirable immigrants by amending immigration laws. Jan. 11, 1912. 16 p. (S. doc. 273.) Paper, 5c.

Immigration laws, rules of Nov. 15, 1911. 1st ed. 1912. 67 p. *Immigration and Naturalization Bureau.* Paper, 10c.

Interparliamentary Union. Report favoring H. J. R. 217 to extend invitation of Congress to. Jan. 23, 1912. 2 p. (H. rp. 259.) *For. Affairs Comm.*

¹ When prices are given, the document in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Navies of the world, Information concerning principal. 25 p. 1 tab. *Naval Intelligence Office*. Paper, 5c.

Salvage. International convention for unification of certain rules of law with respect to assistance and salvage at sea, concluded at Brussels, Sept. 23, 1910, signed by delegates of United States to 3d International Conference on Maritime Law [with report of American delegation on convention relating to salvage]. Aug. 5, 1911. 19 p. Senate Ex. K. 62d Cong. 1st sess.

GREAT BRITAIN ²

France, Arrangement between United Kingdom and, respecting the delimitation of the frontier between the British and French possessions east of the Niger. London, Feb. 19, 1910. (Cd. 6013.) 3½d.

Industrial property and merchandise marks. Papers and correspondence relative to the recent conference at Washington, for the revision of the international convention for the protection of industrial property and the arrangement for the prevention of false indications of origin on goods. (Cd. 5842.) 1s. 3d.

International Sugar Commission, Report of the British delegate to, Dec., 1911. 2d.

"Oldhamia," Correspondence respecting the destruction of the British steamship, by Ensign Tregonboff of the Russian cruiser "Oleg" in May, 1905. (Cd. 6011.) 5d.

² Official publications of Great Britain and many of the British colonies may be purchased of Wyman & Sons, Ltd., Fetter Lane, E. C., London, England.

GEO. A. FINCH.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

HERRERA ET AL. V. UNITED STATES

Supreme Court of the United States

January 15, 1912

Mr. Justice MCKENNA delivered the opinion of the court.

Petition in the Court of Claims for the recovery of \$88,200 for the value of the use and profits of which claimants were deprived, as it is alleged, by the taking and detention of a certain steamship by the United States during the war with Spain, and for the loss of certain property belonging to and a part of such steamship alleged to be "fairly worth" the sum of \$5,000, amounting in all to the sum of \$93,200.

Claimants base their right to recover upon an implied contract arising from the facts which we shall presently detail. Opposing this view, the government contends that the property was enemy property seized for military uses and that, besides, the record does not show a "convention between the parties" or circumstances from which a contract could be implied, and that therefore the case is one sounding in tort and claimants have no right of recovery.

The court found as a conclusion of law from the facts, "on the authority of the case of *Hijo v. United States*, 194 U. S. 315, that the claim herein is one arising from the capture and use of a vessel as an act of war, and the court is therefore without jurisdiction, and the petition is dismissed."

The claimants, at the time the steamship was taken, composed a commercial partnership, doing business under the firm name of Herrera Nephews. They were born in Spain, and, under the Spanish régime in Cuba, were Spanish subjects residing in Havana. After the treaty they did not, in accordance with its terms, preserve their allegiance to Spain.

On the 16th day of July, 1898, the Spanish forces then occupying the territory constituting the division of Santiago, including the city and port of that name, capitulated to the United States in accordance with the terms of a military convention which provided that all hostilities

between the American and the Spanish forces in that district should cease and that the Spanish forces should be returned, at the expense of the United States, to Spain. Actual hostilities ceased with the surrender of Santiago.

The United States military authorities seized and captured the steamer *San Juan* on the 17th of July, 1898, she having been held in the harbor by its blockade by the United States naval authorities. Prior to that date she had been used to transport Spanish troops, munitions of war and supplies for the Spanish troops from place to place. After her capture she was used for like service for American troops and indigent Cubans until November, 1898, a period of 115 days. The reasonable value of her use was \$150 per day, amounting to the sum of \$17,250, no part of which has been paid to claimants.

After the surrender of Santiago and the seizure of the steamship, the Secretary of War, on July 18, 1898, in pursuance of the proclamation of the President of July 13, 1898, issued General Order No. 101, which, among other things, provided that

Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity, are not to be retained. * * *

Private property taken for the use of the Army is to be paid for, when possible, in cash, at a fair valuation, and when payment in cash is not possible receipts are to be given.

This order was promulgated in Cuba, July 20, 1898.

On November 8, 1898, the Quartermaster-General of the Army telegraphed to R. A. C. Smith, the representative and attorney-in-fact of claimants, that it was proposed to return the "captured steamer" to owners, and asked him to wire their names. Smith answered on the 12th "that claimants agreed to accept the vessel, reserving their right to make claim." On the 15th the War Department notified Smith that the government was ready to deliver the vessel to her owners upon condition that a receipt be given showing that she was accepted with full knowledge and understanding that the Secretary of War did not consider that any allowance was due the owners on account of her use, she being captured property, or for any damage sustained by her while she was in the possession of the United States, and that any claim subsequently made should be a matter for future consideration by the War Department.

The terms were rejected and she remained in the possession of the United States.

On April 25, 1899, the quartermaster at Santiago, on instructions from the War Department, wrote claimants' agent that if they did not receive the steamer "in accordance with the conditions hereinafter expressed," she would be delivered to the Department of the Quartermaster of the Army and retained as property of the United States.

On the 17th claimants accepted her and gave the following receipt:

Received this 17th day of May, 1899, at Santiago, Cuba, from Maj. John T. Knight, quartermaster, U. S. Army, chief quartermaster Department of Santiago, the steamship *San Juan*, which vessel is accepted with the full knowledge and understanding that the Secretary of War does not consider that any allowance is due the owners on account of the use of the vessel, she being captured property, or for any damages sustained while the vessel has been in possession of the United States Government, the return of the vessel being a generous act on the part of the United States Government, and that any claim subsequently made for such use and damages shall be a matter for future consideration of the War Department.

And we name and authorize our agents in Santiago de Cuba — Messrs. Gallego, Mesa & Co., of said city — to receive and take possession of said steamship *San Juan*.

They also executed a paper which recited that it was given in consideration of the prompt return of the vessel to claimants, and that released the government and its officers and agents "from all manner of actions, damages, claims, and demands whatsoever" on account of her seizure, detention, and use.

From the time that the Quartermaster-General of the Army proposed to return the vessel until May 17, 1899, a period of 190 days, the vessel, though retained by the United States, was not used. During said period the United States kept a watchman on board, who was paid \$45 per month. The compensation claimants are entitled to, if any, for such period, taking into account that the vessel was not used, would be \$125 per day, or \$23,750.

Upon the return of the vessel to claimants, tools and implements of the value of \$232.50 were missing, but it is not shown by whom they were taken. No other property is shown to have been taken possession of by the United States. The steamer, when returned, appeared to have been in as good condition as when taken into possession, ordinary wear and tear excepted.

As we have seen, the Court of Claims rested its decision on the case of

Hijo v. United States, and that case also is the main reliance of the government's argument. Claimants, however, contend that the *Hijo* case is distinguishable from that at bar.

The action there was brought to recover the value of the use of a vessel belonging to Spanish subjects and taken by the United States in the port of Ponce, Porto Rico, when that city was captured by the United States army and navy on July 28, 1898. The vessel was used by the quartermaster until some time in April, 1899, when she was ordered to be returned to the owner, if all claims for damages for use or detention should be waived. The condition was refused, and the vessel was subsequently abandoned and was wrecked in a hurricane. We quote the following from the statement of facts in the opinion:

The vessel was never in naval custody nor condemned as prize. When seized it was a Spanish vessel, carried a Spanish flag, and its owner, captain and crew were all Spanish subjects. It did not come within any of the declared exemptions from seizure set forth in the proclamation of the President of April 26, 1898. 30 Stat. 1770. A claim filed in the War Department in February, 1900, for its use, was rejected.

The Court of Claims dismissed the petition on the ground that the vessel was properly seized as enemy property and its use was by the war power for war purposes. This court sustained the judgment and the principles upon which it was based.

A question of jurisdiction became prominent in the case. The action was brought in the District Court of Porto Rico, and the court could only have had jurisdiction under the Tucker Act, so-called, which provides for the bringing of suits against the United States. 24 Stat. 505, c. 359. In other words, as expressed in the act, omitting grounds of action with which the case was not concerned, that court was given jurisdiction of suits "upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort." Considering whether the action was of that nature, this court said that there was no element of contract in the case, for nothing was done or said by the officers of the United States from which could be implied an agreement or obligation to pay for the use of the vessel; and declared, further, that according to established principles of law, its owners, being Spanish subjects, were to be deemed enemies, although not directly connected with military operations, and that therefore the vessel was to be deemed enemy's property. "It was seized," it was said, "as property of that kind, for purposes of war, and

not for the purposes of gain." In further emphasis of this conclusion, it was added: "The seizure, which occurred while the war was flagrant, was an act of war occurring within the limits of military operations. The action, in its essence, is for the recovery of damages, but as the case is one sounding in tort, no suit for damages can be maintained against the United States."

It was also decided that the claim of the plaintiff in the action was embraced in the stipulation in the treaty of peace between Spain and the United States, by which they "mutually relinquished all claims for indemnity, national and individual, of every kind, of either government, or its citizens or subjects, arising against the other government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war. * * *" That effect, it was declared, must be given to the treaty, even though the Tucker Act could have been construed to authorize the suit, upon the ground that each being equally the supreme law of the land, the last in date must prevail in the courts.

Before comparing that case with the case at bar we may take a glance at *Juragua Iron Co. v. United States*, 212 U. S. 297, where it was decided that, Cuba being "enemy's country," even "an American corporation doing business in Cuba during the war with Spain was to be deemed an enemy of the United States with respect to its property found and then used in that country, and such property could be regarded as enemy's property, liable to be seized and confiscated by the United States in the progress of the war then being prosecuted."

The action in that case was in the Court of Claims to recover from the United States the alleged value of certain property destroyed in Cuba during the war with Spain, by order of the officer commanding the United States troops operating in the locality of the property, the purpose of the order being "to destroy all places of occupation or habitation which might contain fever germs." The buildings destroyed were sixty-six in number and were used in connection with mining operations and the manufacture of iron and steel products.

The destruction of the buildings was considered as an act of war and sustained as such. It was also decided, that, even on the supposition that such destruction was wrongful and unnecessary a tort was committed, and though committed in the interest of the United States, there was no element of contract and the action was not one of which the Court of

Claims could "take cognizance, whatever other redress was open to the plaintiff."

We have, then, these propositions established: Cuba was enemy's country, and all persons residing there pending the war, whether Spanish subjects or Americans, were to be deemed enemies of the United States, their property enemy's property and subject to seizure, confiscation, and destruction. It would seem necessarily to follow that the claimants in this case were enemies of the United States, and their property subject to the necessities of war. And this is but the application of the rule which declares that war makes of the citizens or subjects of one belligerent enemies of the government and of the citizens or subjects of the other. *The Venice*, 2 Wall. 258, 274; *White v. Burnley*, 20 How. 235, 249.

These consequences, it is insisted, are averted in the case at bar by two important circumstances: that Santiago, unlike Porto Rico, was not captured but capitulated, and by the explicit direction of the proclamation of the President of July 13, 1898, promulgated in Cuba on the 20th. The argument is that those circumstances modified the general rule, and that the property of claimant ceased to be "hostile" and passed "under the sovereignty" of the United States, and as inviolable as other property under the jurisdiction of the United States, and, if taken for public use, an obligation to make compensation would be implied. *The Venice*, 2 Wall. 258, and other cases are adduced to support the contention. It was decided in *The Venice* that after the surrender of New Orleans its military occupation by the federal forces "drew after it the full measure of protection to persons and property consistent with a necessary subjection to military government." The limitation is important. The case is not as broad as the contention which it is cited to support. It was concerned with the restoration of the authority of the United States over a part of the United States which had been in a state of insurrection, and in such case, that is, in districts occupied by national troops, it was "the policy of the government not to regard such districts as in actual insurrection, or their inhabitants as subject in most respects to treatment as enemies." Such occupation, it was said, did not "restore peace, or, in all respects, former relations;" but it replaced "rebel by national authority," and recognized, "to some extent, the conditions and the responsibility of national citizenship." In emphasis of the same view, it was said: "As far as possible the people of such parts of the insurgent States as came under national occupation and control were treated as if their relations to the National Government had never been interrupted."

The Ouachita Cotton, 6 Wall. 521, does not change the ruling in *The Venice* from an expression of the special policy of the government indicated by its legislation to a declaration of law necessarily following from the military occupation of even enemy country. It was an obvious application of the principles of *The Venice* to hold that, with the restoration of the national authority, "from that time its citizens were clothed with the same rights of property, and were subject to the same inhibitions and disabilities as to commercial intercourse with the territory declared to be in insurrection, as the inhabitants of the loyal States," and that "such is the result of the application of well settled principles of public law." To the same effect is *Desmare v. United States*, 93 U. S. 605, 611. Nor was there any intention to enlarge the ruling in *The Venice* in *United States v. Padelford*, 9 Wall. 531.

The case of *The Grapeshot*, 9 Wall. 129, is also cited by claimants, and some of its language demands notice. The question involved was the legality of a provisional court for the State of Louisiana established by the President after New Orleans and parts of the State had been occupied by the national troops. Expressing the purpose of the National Government the court said that it was "neither conquest nor subjugation, but the overthrow of the insurgent organization, the suppression of insurrection, and the re-establishment of legitimate authority." It was further said that it was the duty of the government, "wherever the insurgent power was overturned, and the territory which had been dominated by it was occupied by the national forces, to provide as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice." To this was added the following:

The duty of the National Government, in this respect, was no other than that which devolves upon the government of a regular belligerent occupying, during war, the territory of another belligerent. It was a military duty, to be performed by the President as Commander-in-Chief, and intrusted as such with the direction of the military force by which the occupation was held.

But it was not intended to express a limitation upon the undoubted belligerent right to use and confiscate all property of an enemy and to dispose of it at will. *Miller v. United States*, 11 Wall. 268, 305. *The Venice*, and cases like it, expressed and enforced limitations to a certain extent upon such right growing out of the policy of the government. It may be, as said by Kent (1 Kent 92), that

The general usage now is not to touch private property on land, without making compensation, unless in special cases, dictated by the necessary operations of war, or when captured in places carried by storm, and which repelled all overtures for capitulation.

It may also be, as further said by the learned commentator, that "if the conqueror goes beyond these limits wantonly, or when it is not clearly indispensable to the just purpose of war, and seizes private property of pacific persons for the sake of gain, he violates modern usages of war." *Id.*, 92 and 93.

If the record presented such a case the question could be raised whether it presented one for judicial cognizance, even if a court could share the indignation which the learned commentator says all mankind would feel. It is certain that the court's power cannot be enlarged by its emotions. Besides, we must regard the seizure of the *San Juan* as an exertion of the war power, and by this we do not mean as mere "booty of war," and the comments made in *Planters' Bank v. Union Bank*, 16 Wall. 483, 495, in regard to an attempt by the commander at New Orleans, fifteen months after the occupation of the city by the National Government, to confiscate the indebtedness of one of the banks to the other, do not apply. We only mean that the seizure was for the immediate use of the army, a right recognized in that case, for we do not accept the view contended for by claimants that with the surrender of Santiago and the cessation of active operations in the Santiago district enemy property lost such character and was not subject to such right of capture. The war was flagrant elsewhere, and in such case *Planters' Bank v. Union Bank* is authority for the right, not against it. It was there decided that the military commander at New Orleans "had power to do all that the laws of war permitted, except so far as he was restrained by the pledged faith of the government, or the effect of congressional action." Such pledge and effect existed, it was held, citing the case of *The Venice*. It may be said the indebtedness was not absolutely exempt from confiscation as enemy's property, but only that it was not, under the particular circumstances, "subject to military seizure as booty of war." And "booty of war" was distinguished from "a seizure for immediate use of the army." This is a distinction important to observe, and is recognized explicitly or implicitly in all of the cases and references contained in the able argument of counsel. It accommodates, when its full range is properly understood, the necessities of the conqueror and the personal and property rights, if they may be called such, of the conquered. And there is noth-

ing in the President's proclamation of July 13, 1898, which militates against it. But suppose we should grant the contrary. Suppose we should grant to the *San Juan* the broadest immunity from seizure or detention. We are then brought to consider the quality of the act of the officers of the army who seized and used her. It would seem easy to describe. If it was done in violation of the President's proclamation; if it was done in violation of the laws of war and the conditions arising from the capitulation of Santiago, it was done in wrong, and claimants encounter the prohibitions of the Tucker Act against the jurisdiction of the Court of Claims. They are in the situation of the claimant in *Hijo v. United States* and *Juragua Iron Co. v. United States*. A tort was committed against them, and though committed in the interest of the United States, there is no element of contract and the action is one of which the Court of Claims could not take jurisdiction, whatever other redress is open to claimants. Indeed, we might have rested this branch of the case on those cases, both for the requirements of the Tucker Act and the rights and powers of belligerents, conqueror or conquered. We have restated the propositions declared only in deference to the earnestness and force of the argument of claimants' counsel. And we rest the case on those propositions and do not enter into a consideration of the citizenship of claimants, whether born in Spain and Spanish subjects when their vessel was seized, or Cuban by relation to the time either of the declaration of Cuban independence or of its recognition by Congress, as contended. If Spanish subjects, under the authority of *Hijo v. United States*, their right of indemnity for the seizure and use of their vessel was taken away by the treaty between Spain and the United States.

Judgment affirmed.

STATE OF MARYLAND V. STATE OF WEST VIRGINIA

(*Supreme Court of the United States.*)

217 U. S. 1.

Mr. Justice Day delivered the opinion of the court:

This case originates in a bill filed by the State of Maryland, October 12, 1891, against the State of West Virginia, invoking the original jurisdiction of this court, conferred by the Constitution for the settlement of controversies between States. At its January session of 1890

the General Assembly of the State of Maryland passed an act authorizing and directing its Attorney-General to take such steps as might be necessary to obtain a decision of the Supreme Court of the United States which would settle the controversy between the States of Maryland and West Virginia concerning the true location of that portion of the boundary line between the two States lying between Garrett County, Maryland, and Preston County, West Virginia.

Preston County, West Virginia, was erected out of Monongalia County, Virginia, in the year 1818. Garrett County, Maryland, was erected out of the western portion of Alleghany County under Chapter 212 of the Acts of the General Assembly of the State of Maryland of 1872.

The boundary in controversy runs between the two States from the headwaters of the Potomac to the Pennsylvania line.

The bill of complaint states the foundation of the Maryland title to be the charter granted on June 20, 1632, by King Charles I of England to Cecilius Calvert, Baron of Baltimore, all rights under which, it is averred, have vested in the complainant, the State of Maryland. Virginia, it is alleged, by her first Constitution of June 29, 1776, disclaimed all rights to property, jurisdiction, and government over the territory described in the charter of Maryland and the other colonies, in the following terms:

The territories contained within the charters erecting the colonies of Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released, and forever confirmed to the people of those colonies respectively, with all the rights of property, jurisdiction, and government, and all other rights whatsoever which might, at any time heretofore, have been claimed by Virginia, except the free navigation and use of the rivers Potomac and Pokomoke, with the property of the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been or shall be made thereon.

The bill also recites complainant's title to the South Branch of the Potomac River. It avers the failure to settle the true location of the boundary line in dispute with West Virginia, which State succeeded to the rights and title of Virginia. The bill charges that the State of West Virginia is wrongly in possession of, and exercising jurisdiction over, a large part of the territory rightfully belonging to Maryland; that the true line of the western boundary of Maryland is a meridian running south to the first or most distant fountain of the Potomac River, and that such true line is several miles south and west of the line which the

State of West Virginia claims, and over which she has attempted to exercise territorial jurisdiction.

The State of West Virginia filed an answer and cross bill, in which she sets up her claim concerning the boundary in dispute between the States, and says that the true boundary line, long recognized and established, is the one known as the "Deakins" line, and in the answer and cross bill she prays to have that line established as the true line between the States. She also alleges in her cross bill that the north bank of the Potomac River, from above Harper's Ferry to what is known as the Fairfax stone, is the true boundary between the States; that West Virginia should be awarded jurisdiction over that portion of the river to the north bank thereof.

There is much documentary and other evidence in the record bearing upon the contention that the South Branch of the Potomac River is the true southern boundary of Maryland, but in the briefs and arguments made on behalf of Maryland in this case the claim for the South Branch of the Potomac as the true boundary is not pressed, and the controversy is narrowed to the differences in the location of the boundary, taking the North Branch of the Potomac River as the true southern boundary line of Maryland.

As we have already said, the contention of the State of Maryland is rested upon the construction of the charter granted by King Charles I, June 20, 1632, to Lord Baltimore. The part of the charter necessary to consider is here given in the original Latin,* and the translation thereof, as the same is contended for in the brief filed for the State of Maryland:

Western and Southern boundaries, which calls are as follows, to wit:

Going from the said estuary called Delaware bay in a right line in the degree aforesaid to the true meridian of the first fountain of the river Potomac, then tending downward towards the south to the farther bank of the said river, and following it to where it faces the western and southern coasts as far as to a certain place called Cinquack, situate near the mouth of the same river, where it discharges itself in the aforesaid bay of Chesapeake, and thence by the shortest line as far as the aforesaid promontory or place called Watkin's Point.

There is some difference in the record as to the true Latin text and the translation thereof. For our purpose it is sufficient to consider that presented by the State of Maryland in the language above set forth. It

* Omitted from this JOURNAL.

is to be observed that the purpose of this part of the grant was to locate the northern line of the State of Maryland from Delaware Bay "to the true meridian of the first fountain of the river Potomac, then tending downward toward the south to the farther bank of said river, and following it to where it faces the western and southern coasts as far as to a certain place called Cinquack," etc.

It is the contention of the State of Maryland that the controversy between her and the State of West Virginia is narrowed to a proper location of the true meridian from the first fountain head of the Potomac River, which, being located, will effectually settle the boundary line in dispute. The claim of the State of Maryland may be further illustrated by a consideration of the plate exhibited in the brief filed in behalf of that State. * * *

It is to be noted in considering this plate that the north and south line at the left is called the Potomac meridian, running from a certain point designated as the Potomac stone. It is insisted for the State of Maryland that the spring at this point most nearly fulfils the terms of the Lord Baltimore charter, in that it properly locates the true meridian of the first fountain head of the Potomac River, and following it according to the description in the grant, embraces said river to its farther bank as the true boundary of Maryland.

On the other hand, West Virginia contends that the true head of the river Potomac is at the Fairfax stone, and that the boundary should be located by a line from the spring at that point; and that such has long been the recognized boundary line between Virginia, West Virginia, and Maryland. The distance from the Fairfax meridian to the Potomac meridian is about one and one-quarter miles, and the distance to the Pennsylvania line about thirty-seven miles.

It may be true that the meridian line from the Potomac stone, in the light of what is now known of that region of country, more fully answers the calls in the original charter than does a meridian line starting from the Fairfax stone. But it is to be remembered that the grant to Lord Baltimore was made when the region of the country intended to be conveyed was little known, was wild and uninhabited, had never been surveyed or chartered, and the location of the upper part of the Potomac River was only a matter of conjecture.

It is said and the record tends to show, that the only map of the country then known to be in existence was one prepared and published by Captain John Smith, upon which only a very small part of the

Potomac River is shown, and from which we get no light as to the true source and course of the upper reaches of the Potomac River. The so-called Potomac stone was neither set nor located until 1897, six years after the beginning of this suit, when it was put in place by the surveyor in this case, on the part of the State of Maryland. He then set a monument designated as the "Potomac stone," and gave the name Potomac to the spring at the origin of that fork of the Potomac River. The so-called Potomac meridian was run by the same engineer, located and named by him in the year 1897.

The Fairfax stone, which is shown at the beginning of the north and south line in plate No. 1, has a history and importance in this case which renders it necessary to note something of its origin and location. Without going into a history of the prior grants in Virginia, we come directly to the one bearing upon this case. It was made in September, 1688, by King James II of England, for the northern neck of Virginia, to Thomas (Lord) Culpeper, which subsequently became the property of Lord Fairfax, and is usually spoken of as the Fairfax grant. That grant was under consideration in this court in the case of *Morris v. United States*, 174 U. S. 198, 43 L. ed. 947, 19 Sup. Ct. Rep. 649, a case to which we shall have occasion to refer later, and from page 223 of that report we take a description of so much of the grant as is necessary to a consideration of this cause. The northern neck of Virginia is described in that grant as follows:

All that entire tract, territory, or parcel of land situate, lying and being in Virginia, in America, and bounded by and within the first heads or springs of the rivers of Tappahannock als Rappahannock and Quiriough als Patowmack rivers, the courses of said rivers from their said first heads or springs, as they are commonly called and known by the inhabitants and description of those parts and the bay of Chesapeake, together with the said rivers themselves and all the islands within the outermost banks thereof, and the soil of all and singular the premises, and all lands, woods, underwood, timber, and trees, ways, mountains, swamps, marshes, waters, rivers, ponds, pools, lakes, water courses, fishings, streams, havens, ports, harbours, bays, creeks, ferries, with all sorts of fish, as well whales, sturgeons, and other royal fish. * * * To have, hold, and enjoy all the said entire tract, territory, or portion of land, and every part and parcel thereof, * * * to the said Thomas, Lord Culpeper, his heirs and assigns forever.

The territory embraced in this northern neck became subject to the jurisdiction and dominion of Virginia, and the boundary lines fixed for it became important in determining the true boundary between Virginia

and adjoining States. In the grant to Lord Culpeper the tract is described as lying in Virginia, in America, and bounded by and within the first heads or springs of the rivers, Rappahannock and Patowmack. Disputes having arisen between the governor and council of Virginia and Lord Fairfax, touching the true boundary of the grant, an order was made on November 29, 1733, by the King in Council, reciting that Lord Fairfax had petitioned for an order to settle the boundaries of his tract, and for a commission to issue, run out, and ascertain the boundaries of the same. The King granted an order, and thereafter the governor of Virginia, on September 7, 1736, appointed certain commissioners to act for the colony of Virginia in the matter; Lord Fairfax appointed certain commissioners to act on his behalf.

The instructions to the commissioners required them to make a clearer description of the boundaries in controversy, to make exact maps of the rivers Rappahannock and Potomac, and the branches thereof to the head or spring, so-called or known, and the surveys made by them, with correct maps thereof, to be laid before his Majesty. The commission adopted the North Branch of the Potomac River, then known as the Cohaungoruton, and after further proceedings, which are not necessary to recite in detail, and after a reference to the Lords of Trade and Plantations, a report was made which, among other things, stated that a line run from the first head or spring of the south or main branch of the Rappahannock River to the first head or spring of the Potomac River is, and ought to be, the boundary line determining the tract or territory of land commonly called the northern neck. Ultimately the matter was laid before the King in Council, and commissioners were appointed to mark and run the line between the head spring of the rivers Rappahannock and Potomac, and the stone called the Fairfax stone was planted in September, 1746, at the head spring of the Potomac River. In 1748, the location of the stone was approved by the Virginia Assembly and the King in Council. This Fairfax stone has been an important monument in settling and establishing boundaries since that time.

It was found still in place in 1859 by Lieutenant Michler, who made a survey on behalf of the boundary commissioners of Maryland and Virginia, to which we shall have occasion to refer later on. In his report Lieutenant Michler describes the stone as follows:

The initial point of the work, the oft-mentioned, oft-spoken of "Fairfax stone," stands on a spot encircled by several small streams flowing from the springs about it. It consists of a rough piece of sandstone, indifferent and friable.

planted to a depth of a few feet in the ground, and raising a foot or more above the surface. Shapeless in form, it would scarcely attract the attention of the passer-by. The finding of it was without difficulty, and its recognition and identification by the inscription "Ffx," now almost obliterated by the corroding action of water and air.

Without stopping to mention the cases in which Virginia has recognized this monument in creating counties and otherwise, it is to be noted that it was recognized as a boundary point by the State of Maryland in erecting Garrett County, the boundary between which and Preston County, West Virginia, it was the purpose of the act of the Legislature of Maryland to have settled by the filing of the bill and proceedings in the present case.

By the Constitution of Maryland of 1851 it is provided (Article 8, par. 2):

When that part of Alleghany county lying south and west of a line beginning at the summit of Big Back Bone or Savage mountain where that mountain is crossed by Mason and Dixon's line, and running thence by a straight line to the middle of Savage river, where it empties into the Potomac river, thence by a straight line to the nearest point or boundary of the state of Virginia, thence with said boundary to the Fairfax stone, shall contain a population of ten thousand, and the majority of electors thereof shall desire to separate and form a new county and make known their desire by petition to the legislature, the legislature shall direct, at the next succeeding election, that the judges shall open a book at each election district in said part of Alleghany county and have recorded therein the vote of each elector "for or against" a new county. In case the majority are in favor, then said part of Alleghany county to be declared an independent county, and the inhabitants whereof shall have and enjoy all such rights and privileges as are held and enjoyed by the inhabitants of the other counties in this state.

In the act of 1872, creating Garrett County, it is provided:

That all that part of Alleghany county lying south and west of a line beginning at the summit of Big Back Bone or Savage mountain where that mountain is crossed by Mason and Dixon's line, and running thence by a straight line to the middle of Savage river where it empties into the Potomac river; thence by a straight line to the nearest point or boundary of the state of West Virginia, then with the said boundary to the Fairfax stone, shall be a new county, to be called the county of Garrett, provided, etc.

It appears that not infrequent attempts have been made to settle the controversy between the States now at the bar of this court. In the years 1795, 1801, and 1810 certain commissioners were provided for by the State of Maryland to meet commissioners to be appointed by the

State of Virginia, with power to adjust the boundary between the southern and western limits of the State of Maryland and the dividing line between it and Virginia. Nothing seems to have come of these attempts.

In 1818, the State of Maryland passed an act proposing to Virginia the appointment of a commission, to run a line from the most western source of the North Branch of the Potomac.

In February, 1822, the Legislature of Virginia expressed its willingness to appoint commissioners, who were to locate the western boundary by a stone located by Lord Fairfax at the head-waters of the Potomac River. The commissioners met, but the divergency in their instructions prevented any action.

In 1825, Maryland passed an act for the settlement of the boundary, providing that the governor of Delaware should act as umpire. In 1833, Virginia passed an act providing for commissioners to run the lines from the Fairfax stone, or at the first fountain of the Cohangoruton or North Branch of the Potomac River. In default of Maryland appointing commissioners, Virginia commissioners were to run and mark the line.

In October, 1834, the State of Maryland filed a bill in this court against the State of Virginia, which bill was subsequently dismissed without any action being taken thereon. In 1859, a line was run by Lieutenant Michler, of the United States Topographical Engineers, to which we shall have occasion to refer more in detail later on.

By an act of 1781, the State of Maryland appropriated land within the State in Washington County, west of Fort Cumberland, with certain exceptions, to discharge the engagements of the State to the officers and soldiers thereof, and, by a resolution passed in April, 1787, the governor and council were requested

to appoint and employ some skilful person to lay out the manors, and such parts of the reserve and vacant lands, belonging to this state, lying to the west of Fort Cumberland, as he may think fit and capable of being settled and improved, in lots of 50 acres each, bounded by a fixed beginning and four lines only, unless on the sides adjoining elder surveys; that the beginning of each lot be marked with marking irons, or otherwise, with the number thereof, and that a fair book of such surveys, describing the beginning of each lot by its situation, as well as number, be returned and laid before the next general assembly.

Under this resolution, Francis Deakins was appointed to make the survey, and in 1788, an act of the General Assembly of Maryland was passed. It reads, in part, as follows:

And whereas, in pursuance of a resolve of the general assembly, at April session, 1787, authorizing the governor and council to appoint and employ some skilful person to lay out the manors and such parts of the reserves and vacant land belonging to this state, lying to the westward of Fort Cumberland, as he might think fit and capable of being settled and improved, in lots of 50 acres each, Francis Deakins was appointed and employed by the governor and council for that purpose, and has finished the said survey, and has returned a general plot of the county westward of Fort Cumberland, on which 4,165 lots of 50 acres each are laid off, besides sundry tracts which have been patented, distinguishing on the plot those lots which have been settled and improved from those which remain uncultivated; and the said Francis Deakins has also returned two books entitled A and B, in which are entered certificates of all the lots before-mentioned.

And further enacted that 2,575 of the aforesaid lots were contained in the following limits:

Beginning at the mouth of Savage river and running with the North Branch of the Potomac river to the head thereof, then with the present supposed boundary line of Maryland until the intersection of an east line to be drawn from said boundary line with a north course from the mouth of Savage river will include the number of lots aforesaid to be distributed by lot among the said soldiers, and recruiting officers, and their legal representatives, etc.

And it further provides that lots granted to officers should be adjacent to those distributed to the soldiers, within the following limits:

By extending the aforesaid north course from the mouth of Savage river, until its intersection with an east line to be drawn from the aforesaid supposed boundary line of Maryland will include the necessary number, allowing to each officer or his representatives four lots aforesaid.

The act also contains the following language:

And be it enacted, that the line to which the said Francis Deakins has laid out the said lots is, in the opinion of the general assembly, far within that which this state may rightfully claim as its western boundary; and that at a time of more leisure the considerations of the legislature ought to be drawn to the western boundaries of the state, as objects of very great importance.

Deakins filed a map, which is in evidence in this case, and which shows a large number of lots laid out, and also certain outlines of deeds and grants. This line in the briefs and records is sometimes mentioned as having been run in 1787, sometimes 1788, and sometimes 1789. In view of the act of 1788, the line was probably run in that year. As, in our view of the case, the action of Deakins in the location of this line, and his evident adoption of the Fairfax stone as a starting point, is an

important feature of this controversy, we insert herein* a tracing from the original Deakins map, put in evidence on the part of the State of West Virginia. An inspection of this map shows a north and south line upon the west side thereof, and also some of the military lots laid out by Deakins in that part of the tract. It is to be noted that this north and south line is marked: "The meridian line and the head of the North Branch of the Potowmack River as fixed by Lord Fairfax." This could mean but one thing, and that is, an attempted meridian line north from the Fairfax stone, located to the Pennsylvania line.

We shall have occasion to recur to this line.

In 1852 the Legislature of the State of Maryland passed an act concerning the disputed boundary, which act provides:

Whereas it is of great importance that the western territorial limit of the state of Maryland be clearly defined and her boundary be permanently established; and whereas, the true location of the western line of Maryland between the states of Maryland and Virginia, beginning at or near the Fairfax stone on the North Branch of the Potomac river, at or near its source, and running in a due north line to the state of Pennsylvania, is now lost and unknown, and all the marks have been destroyed by time or otherwise; and whereas, the states of Virginia and Maryland have both granted patents to the same tracts of land at or near the supposed line, and as suits of ejectment are now pending in the circuit court of Alleghany county, in the state of Maryland, by persons holding under Maryland patents against persons now in possession and holding land under patents granted by the state of Virginia, which cannot be justly settled without establishing said boundary line:

Therefore, section 1. Be it enacted by the general assembly of Maryland, that the governor be and he is requested to open a correspondence with the governor of Virginia in relation to tracing, establishing, and marking the said line, and in case the legislature of Virginia, shall pass an act providing for the appointment of a commissioner to act in conjunction with a commissioner on the part of Maryland in the premises, then and in such case, the governor be and he is hereby authorized and requested to appoint a commissioner who, together with the commissioner who shall be appointed on the part of Virginia, shall cause the said line to be accurately surveyed, traced, and marked with suitable monuments, beginning therefor at the said Fairfax stone, and running thence due north to the line of the state of Pennsylvania.

Sec. 2. And be it enacted, that it shall be the joint duty of the commissioners after running, locating, establishing, and marking the said line, to make a report setting forth all the facts touching, locating, and marking said line; and it shall be the duty of the commissioner of each respective state to forward copies of the joint report to each of their respective legislatures; and upon the ratification of said report by the state of Virginia and the state of Maryland,

* Omitted from this JOURNAL.

through their respective legislatures, the said boundary lines shall be fixed and established so to remain forever, unless changed by mutual consent of the two states.

In 1854, the General Assembly of Virginia met this action upon the part of the State of Maryland by the passage of an act which provides:

Whereas the general assembly of Maryland has passed an act for running and marking the boundary line between that state and the state of Virginia, beginning therefor at the Fairfax stone on the Potomac river, sometimes called the North Branch of the Potomac river, at or near the source, and running thence due north to the line of the state of Pennsylvania; and whereas the legislature of Maryland has requested the appointment of a commissioner on the part of this state to act in conjunction with the commissioner of Maryland to run and mark said line: therefore, be it enacted.

1. That the governor appoint a commissioner who, together with the Maryland commissioner, shall cause the said line to be accurately surveyed, traced, and marked with suitable monuments, beginning therefor at the Fairfax stone, situated as aforesaid, and running thence due north to the line of the state of Pennsylvania.

And the act concludes:

Upon the ratification of such report by the legislatures of the states of Virginia and Maryland, the said boundary line shall be fixed and established to remain forever, unless changed by mutual consent of the said states.

Under these acts of the Legislatures of the respective States, commissioners were appointed, who made application to the Secretary of War for the services of an officer of the United States Engineers to aid them in carrying out the purposes of the acts. Upon this application, the Secretary of War detailed Lieutenant N. Michler, of the United States Topographical Engineers. As directed in both the acts, Lieutenant Michler commenced his work at the Fairfax stone, and ran a line northwardly, marking it at certain places. This line intersected the Pennsylvania line at a point about three-fourths of a mile west from the northern extremity of the Deakins line, which had been run in 1788, as we have already stated. There was a triangle between the Deakins and Michler lines, having its apex at the Fairfax stone, and lines diverging thence, until there was a difference of three-fourths of a mile at the base of the triangle at the Pennsylvania line.

It appears that the commissioners of the two States differed, the commissioner of Virginia contending that by the act of the Legislature, above referred to, that State had not adopted the meridian line from the Fairfax stone as the boundary. The commissioner of Maryland con-

tended for that meridian line. On March 5, 1860, the Legislature of Maryland passed an act adopting the Michler line, commencing at the Fairfax stone at the head of the North Branch of the Potomac River, and running thence due north to the southern line of Pennsylvania, as surveyed in the year 1859 by commissioners appointed by the States of Maryland and Virginia, and thereafter the State of Maryland provided for the marking of the Michler line.

Virginia did not approve of the Michler line, but in 1887 West Virginia passed an act confirming the line as run by Lieutenant Michler in 1859 as the true boundary line between West Virginia and Maryland, but the act was not to take effect until and unless Maryland should pass an act or acts confirming and rendering valid all the entries, grants, patents, and titles from the Commonwealth of Virginia to any person or persons, to lands situate and lying between the new Maryland line and the old Maryland line heretofore claimed by Virginia and West Virginia, to the same extent and with the like legal effect as though the said old Maryland line was confirmed and established.

The divergence between Michler's line and the line shown on Deakins's map probably arises from the fact that Lieutenant Michler ran a true astronomical line, and that his line is a true north and south line, whereas the Deakins line was probably run with a surveyor's compass, and with less accuracy than the Michler line.

It is the contention of the State of Maryland that Deakins never attempted to run a true north and south line; that he never had any authority from the State of Maryland so to do; and that, in the act confirming the laying out of the lots by Deakins, it was especially declared by the State of Maryland that it did not show the true western boundary of the State; furthermore, that the attempts which have been made to trace the Deakins line show that it is not a true north and south line, but a broken line, having offsets in various places.

The State of Maryland insists that the evidence shows that a number of old grants made prior to the Deakins survey would extend west of the boundary line, as shown either by Deakins or Michler. It is the contention of the State of Maryland that when these grants were made she indicated a line further to the west than either of these lines, and that the ancient grants of large tracts of land show that fact. But the evidence contained in this record leaves no room to doubt that after the running of the Deakins line the people of that region knew and referred to it as the line between the State of Virginia and the State of Mary-

land. Lieutenant Michler, in the frank and able report filed with his survey, recognizes this situation, for he says:

The meridian as traced by me last summer differs from all previous lines run; some varying too far to the east, others too far to the west. The oldest one, and that generally adopted by the inhabitants as the boundary lines, passes to the east; and from measurements made to it I found that it was not very correctly run. The surveyor's compass was used for the purpose, and some incorrect variation of the needle allowed. Owing to the thick and heavy growth of timber, it is utterly impossible to run a straight line through it without first opening a line of sight. It could only be approximately done.

When north of the railroad, and the nearer the Pennsylvania line is approached, the settlements and farms become more numerous; and if the meridian line is adopted as the boundary, it will cause great litigation, as the patents of most of the lands call for the boundary as their limits. On the Pennsylvania boundary the new line is about three quarters of a mile west of the old; on the railroad, . . . feet; at Weill's field, 85 feet; on the northwestern turnpike, about 40 feet, and on the backbone, about 20 feet.

These recitals from Lieutenant Michler's report, if the record were lacking in other evidence, would leave little doubt that there was an old boundary line, generally adopted, and that the adoption of the true meridian line, which Lieutenant Michler ran, would cause great litigation because of the acquiescence of the people in the old boundary line, — the Deakins line.

The report of the committee of the Maryland Historical Society, an exhibit in this case, contains a history of the boundary dispute, and it is therein said:

The provisional line of 1787, or "Deakins line," as it was called, had long done duty as a boundary; and as the state granted no lands beyond it, it came to be looked upon, despite the emphatic protest of the assembly of 1788, as the true boundary line of the state. In process of time the marks became obliterated, and conflicts of title and litigation arose between the holders of Maryland and the holders of Virginia patents for lands in the debatable territory. So in May, 1852, the Maryland legislature passed an act reciting these facts, and requesting the governor to open a correspondence with the governor of Virginia about the matter; and authorizing him to appoint a commissioner, if the legislature of Virginia would also appoint one, which joint commission should run and mark a line due north from the Fairfax stone, which line, when ratified by both legislatures, should be the boundary between the states.

The State of Maryland has herself, in sundry grants, recognized this old line. In a grant by the State of Maryland for a tract called "Maryland," dated January 23, 1823, among other calls is this one:

Running thence south 36 degrees west, 86 perches to the Virginia and Maryland line, as run under the directions of Francis Deakins at the time of laying out the lots to the westward of Fort Cumberland, and thence running, etc.

In the Deakins description of the first lot north of the Fairfax stone, the following language is used in describing military lot No. 1101:

Beginning at a bounded maple marked 1100, *standing one mile north from a stone fixed by Lord Fairfax for the head of the North Branch of the Potomack river*, and running north, 89½ perches; east, 89½ perches; south, 89½ perches; then to the beginning, containing 50 acres.

This record leaves no doubt as to the truth of the statement contained in the report of the committee of the Maryland Historical Society, that the Deakins line, before the passage of the act under which the Michler line was run, had long been recognized as a boundary and served as such. Even after the Michler line was run and marked, the testimony shows that the people generally adhered to the old line as the true boundary line. There are numerous Virginia grants and private deeds of land given in the record, which call for this old Maryland line as the boundary.

The testimony shows that the people living along the Deakins line worked and improved the roads on the Virginia side, as a general rule, up to this line. Correspondingly, Maryland worked the roads on the other side of this line. On the west of the line, the people paid taxes on their lands in Preston County, West Virginia. They voted in that county, and with rare exceptions regarded themselves as citizens of West Virginia. As a general rule, the schools established there were West Virginia schools. The allegiance of nearly all these people has been given to West Virginia.

It is true there has been more or less contention as to the true boundary line between these States. Attempts have been made to settle and adjust the same, some of which we have referred to, and the details of which may be found in the very interesting document to which we have already made reference, the report of the committee of the Maryland Historical Society. In the proposed settlements, for many years, Virginia and West Virginia have consistently adhered to the Fairfax stone as a starting point for the disputed boundary. When West Virginia passed the act of 1887, ratifying the Michler line, it was upon condition that Virginia titles granted between the Michler line and the old Maryland should be validated. Maryland, in the act of 1852, recognized the same starting point.

And the fact remains that after the Deakins survey of 1788, the people living along the line generally regarded that line as the boundary line between the States at bar. In the acts of the Legislatures of the two States, to which we have already referred, resulting in the survey and running of the Michler line, it is evident from the language used that the purpose was not to establish a new line but to retrace the old one; and we are strongly inclined to believe that had this been done at that time, the controversy would have been settled.

A perusal of the record satisfies us that for many years occupation and conveyance of the lands on the Virginia side has been with reference to the Deakins line as the boundary line. The people have generally accepted it and have adopted it, and the facts in this connection cannot be ignored. In the case of *Virginia v. Tennessee*, 148 U. S. 503, 522, 523, 37 L. ed. 537, 544, 13 Sup. Ct. Rep. 728, 736, Mr. Justice Field, speaking for the court, had occasion to make certain comments which are pertinent in this connection, wherein he said:

Independently of any effect due to the compact as such, a boundary line between states or provinces, as between private persons, which has been run out, located, and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary. Lord Hardwicke in *Penn v. Baltimore*, 1 Ves. Sr. 444, 448; *Boyd v. Graves*, 4 Wheat. 513, 4 L. ed. 628; *Rhode Island v. Massachusetts*, 12 Pet. 657, 734, 9 L. ed. 1233, 1264; *United States v. Stone*, 2 Wall. 525, 537, 17 L. ed. 765, 767; *Kellogg v. Smith*, 7 Cush. 375, 382; *Chenery v. Waltham*, 8 Cush. 327; Hunt, *Boundaries*, 3d ed. 306.

As said by this court in the recent case of *Indiana v. Kentucky*, 136 U. S. 479, 510, 34 L. ed. 329, 332, 10 Sup. Ct. Rep. 1051, "it is a principle of public law, universally recognized, that long acquiescence in the possession of territory, and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority." In the case of *Rhode Island v. Massachusetts*, 4 How. 591, 639, 11 L. ed. 1116, 1137, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies, said: "Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary.

And quoting from Vattel on the *Law of Nations* to the same effect:

The tranquillity of the people, the safety of states, the happiness of the human race, do not allow that the possessions, empire, and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title." (Bk. 2, chap. 11, § 149).

And adds from Wheaton on *International Law*:

The writers on natural law have questioned how far that peculiar species of presumption arising from the lapse of time, which is called prescription, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one state excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question. (Pt. 2, chap. 4, § 164).

And it was said:

There are also moral considerations which should prevent any disturbance of long-recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to country, to home, and to family, on which is based all that is dearest and most valuable in life.

In *Louisiana v. Mississippi*, 202 U. S. 1, 53, 50 L. ed. 913, 932, 26 Sup. Ct. Rep. 408, 423, this court said:

The question is one of boundary and this court has many times held that, as between the states of the Union, long acquiescence in the assertion of a particular boundary, and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both.

An application of these principles cannot permit us to ignore the conduct of the States and the belief of the people concerning the purpose of the boundary line known as the old state, or Deakins, line, and to which their deeds called as the boundary of their farms, in recognition of which they have established their allegiance as citizens of the State of West Virginia, and in accordance to which they have fixed their homes and habitations.

True it is, that, after the running of the Deakins line, certain steps were taken, intended to provide a more effectual legal settlement and

delimitation of the boundary. But none of these steps were effectual, or such as to disturb the continued possession of the people claiming rights up to the boundary line.

The effect to be given to such facts as long-continued possession "gradually ripening into that condition which is in conformity with international order" depends upon the merit of individual cases as they arise. 1 Oppenheim, *International Law*, § 243. In this case, we think a right in its nature prescriptive has arisen, practically undisturbed for many years, not to be overthrown without doing violence to principles of established right and justice equally binding upon states and individuals. *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233.

It may be true that an attempt to relocate the Deakins line will show that it is somewhat irregular, and not a uniform, astronomical north and south line; but both surveyors appointed by the States represented in this controversy were able to locate a number of points along the line, and the northern limit thereof is fixed by a mound, and was located by the commissioners who fixed the boundary between West Virginia and Pennsylvania by a monument which was erected at that point, and we think from the evidence in this record that it can be located with little difficulty by competent commissioners.

We think, for the reasons which we have undertaken to state, that the decree in this case should provide for the appointment of commissioners whose duty it shall be to run and permanently mark the old Deakins line, beginning at a point where the north and south line from the Fairfax stone crosses the Potomac River, and running thence northerly along said line to the Pennsylvania border.

As to the contention made by West Virginia in her cross bill, that she is entitled to the Potomac River to the north bank thereof, we think that claim is disposed of by the case of *Morris v. United States*, 174 U. S. 196, 43 L. ed. 946, 19 Sup. Ct. Rep. 649, already referred to. In that case, among other things, there was a controversy between the heirs of James H. Marshall and the heirs of John Marshall as to the ownership of the bed of the Potomac River from shore to shore, including therein certain reclaimed lands. Claim of the one set of heirs was based upon the charter of Lord Baltimore of June, 1632, and that of the others upon the grant of King James II to Lord Culpeper, afterwards owned by Fairfax, to which we have already referred.

After making reference to the award of the commission to fix the Virginia and Maryland boundary, appointed in 1877, fixing the line and

boundary at low-water mark on the Virginia shore, to which arbitration the State of West Virginia was not a party, this court disposed of the controversy, irrespective of that award, in the following language, used by Mr. Justice Shiras in delivering the opinion of the court:

Whether the result of this arbitration and award is to be regarded as establishing what the true boundary always was, and that therefore the grant to Thomas, Lord Culpeper, never of right included the Potomac river, or as establishing a compromise line, effective only from the date of the award, we need not determine. For, even if the latter be the correct view, we agree with the conclusion of the court below, that upon all the evidence, the charter granted to Lord Baltimore by Charles I, in 1632, of the territory known as the province of Maryland, embraced the Potomac river and the soil under it, and the islands therein, to high-water mark on the southern or Virginia shore; that the territory and title thus granted to Lord Baltimore, his heirs and assigns, were never divested by any valid proceedings prior to the Revolution; nor was such grant affected by the subsequent grant to Lord Culpeper.

The record discloses no evidence that, at any time, any substantial claim was ever made by Lord Fairfax, heir at law of Lord Culpeper, or by his grantees, to property rights in the Potomac river, or in the soil thereunder, nor does it appear that Virginia ever exercised the power to grant ownership in the islands or soil under the river to private persons. Her claim seems to have been that of political jurisdiction.

We think this decision disposes of and denies this claim of the State of West Virginia in her cross bill.

Upon the whole case, the conclusions at which we have arrived, we believe, best meet the facts disclosed in this record, are warranted by the applicable principles of law and equity, and will least disturb rights and titles long regarded as settled and fixed by the people most to be affected. If this decision can possibly have a tendency to disturb titles derived from one State or the other, by grants long acquiesced in, giving the force and right of prescription to the ownership in which they are held, it will no doubt be the pleasure, as it will be the manifest duty, of the lawmaking bodies of the two States, to confirm such private rights upon principles of justice and right applicable to the situation.

A decree should be entered settling the rights of the States to the western boundary, and fixing the same, as we have hereinbefore indicated to be run and established along the old line known as the Deakins or old state line; and commissioners should be appointed to locate and establish said line as near as may be. The cross bill of the State of West Virginia should be dismissed in so far as it asks for a decree fixing the north bank of the Potomac River as her boundary. Counsel for the

respective States are given forty days from the entry hereof to agree upon three commissioners, and to present to the court for its approval a decree drawn according to the directions herein given, in default of which agreement and decree this court will appoint commissioners, and itself draw the decree in conformity herewith. Costs to be equally divided between the States.

Decree accordingly.

ROCCA V. THOMPSON.

(Supreme Court of the United States.)

[February 19, 1912.]

Mr. Justice Day delivered the opinion of the Court.

This is a writ of error to the Supreme Court of the State of California to review a judgment in which that court held that the public administrator was entitled to letters of administration upon the estate of an Italian citizen, dying and leaving an estate in California, in preference to the Consul-General of the Kingdom of Italy.¹

The facts are briefly these: Giuseppe Ghio, a subject of the Kingdom of Italy, died intestate on the 27th day of April, 1908, in San Joaquin county, California, leaving a personal estate. Ghio resided in the State of California. His widow and heirs-at-law, being minor children, resided in Italy. Plaintiff in error, Salvatore L. Rocca, was the Consul-General of the Kingdom of Italy for California, Nevada, Washington, and Alaska Territory.

Upon the death of Ghio, Consul-General Rocca made application to the Superior Court of California for letters of administration upon Ghio's estate. The defendant in error, Thompson, as public administrator, made application for administration upon the same estate under the laws of California. The Superior Court held that the public administrator was entitled to administer the estate. The same view was taken in the Supreme Court of California. (157 Cal. Rep. 552.) From the latter decision a writ of error was granted, which brings the case here.

The Consul-General bases his claim to administer the estate upon certain provisions of the treaty of May 8, 1878, between Italy and the United States. Articles XVI and XVII read as follows:

¹ Printed in this JOURNAL, Vol. 4, p. 727.

Article XVI. In case of the death of a citizen of the United States in Italy, or of an Italian citizen in the United States, who has no known heir, or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the Consuls or Consular Agents of the nation to which the deceased belongs, to the end that information may be at once transmitted to the parties interested.

Article XVII. The respective Consuls General, Consuls, Vice Consuls and Consular Agents, as likewise the Consular Chancellors, Secretaries, Clerks or Attaches, shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade of the most favored nation (20 U. S. Stats. at Large, p. 732.)

While Article XVI only requires notice to the Italian consul or consular agent of the death of an Italian citizen in the United States, Article XVII gives to consuls and similar officers of the Italian nation the rights, prerogatives, immunities, and privileges which are or may be hereafter granted to an officer of the same grade of the most favored nation. It is the contention of the plaintiff in error that this favored-nation clause in the Italian treaty gives him the right to administer estates of Italian citizens dying in this country, because of the privilege conferred upon consuls of the Argentine Republic by the treaty between that country and the United States, of July 27, 1853, section 9 of which provides:

If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the Consul-General, or Consul of the nation to which the deceased belonged, or the representative of such Consul-General or Consul, in his absence, shall have the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs. (10 U. S. Stats. at Large, p. 1009.)

From this statement of the case it is apparent that the question at the foundation of the determination of the rights of the parties is found in the proper interpretation of the clause of the Argentine treaty just quoted. The question is: Does that treaty give to consuls of the Argentine Republic the right to administer the estate of citizens of that Republic dying in the United States, and a like privilege to consuls of the United States as to citizens of this country dying in the Argentine Republic? The question has been the subject of considerable litigation and has been diversely determined in the courts of this country which have had it under consideration.

The surrogate of Westchester county, New York, in two cases, *In re Fattosini's Estate*, 67 N. Y. Supp. 1119, and *In re Lobrasciano's Estate*,

77 N. Y. Supp. 1040, has held that the treaty of Italy of 1878, in the most-favored-nation clause, carried the benefit of the Argentine treaty to the consuls of Italy, and that the Argentine treaty conferred the right of administration upon the consuls of that country. In *Wyman, Petitioner*, 191 Mass. 276, the Supreme Judicial Court of that State, as to Russian consuls, under the most-favored-nation clause in the Russian treaty, followed the surrogate courts of Westchester county, observing that the cases were well considered and covered the entire ground. The Supreme Court of Alabama, in *Carpigiani v. Hall*, 55 So. Rep. 248, followed the decisions in New York and Massachusetts just referred to, and in *In re Scutella's Estate*, 129 N. Y. Supp. 20, the Appellate Division of the Supreme Court of New York pursued the same course.

A contrary view was expressed by the Surrogate Court of New York county in *In re Logiorato's Estate*, 69 N. Y. Supp. 507, and by the Supreme Court of Louisiana in *Lanfear v. Ritchie*, 9 La. Ann. 96.

An examination of the cases which have held in favor of the right of a Consul-General to administer the estate, to the exclusion of the public administrator, makes it apparent that the Lobrasciano case, which is the fullest upon the subject, is the one that has been followed without independent reasoning upon the part of the courts adopting it.

In that case the right of a consul to administer the estates of deceased citizens of his country is based, not only upon the interpretation of the treaties involved, but as well upon the law of nations giving the right to consuls to administer such estates. In the opinion some citations are made from early instructions of Secretaries of State, emphasizing the right and duty of consuls to administer upon the effects of citizens of the United States dying in foreign lands.

But these instructions must be read in the light of the statute of the United States, section 1709,* which, while it recognizes the right of

* "Sec. 1709. It shall be the duty of consuls and vice-consuls, where the laws of the country permit:

"First. To take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any vessel, who shall die within their consulate, leaving there no legal representative, partner in trade, or trustee by him appointed to take care of his effects.

"Second. To inventory the same with the assistance of two merchants of the United States, or, for want of them, of any others at their choice.

"Third. To collect the debts due the deceased in the country where he died, and pay the debts due from his estate which he shall have there contracted.

"Fourth. To sell at auction, after reasonable public notice, such part of the

consuls and vice-consuls to take possession of the personal estate left by any citizen of the United States who shall die within their consulates, leaving there no legal representative, partner, or trustee; to inventory the same, and to collect debts, provides in the fifth paragraph of the section that, if at any time before the transmission to the United States Treasury of the balance of the estate the legal representative appears and demands his effects in the hands of the consul, they shall be delivered up and he shall cease further proceedings, and the duties imposed are where "the laws of the country permit."

The consular regulations of the United States tersely express the duty of a consul as to the conservation of the property of deceased countrymen, and declare that he has no right, as consular officer, apart from the provisions of treaty, local law or usage, to administer the estate, or, in that character, to aid any other person in so administering it, without judicial authorization. Section 409 of the Consular Regulations is as follows:

A consular officer is by the law of nations and by statute the provisional conservator of the property within his district belonging to his countrymen deceased therein. He has no right, as a consular officer, apart from the provisions of treaty, local law, or usage, to administer on the estate, or in that character to aid any other person in so administering it, without judicial authorization. His duties are restricted to guarding and collecting the effects, and to transmitting them to the United States, or to aid others in so guarding, collecting and transmitting them, to be disposed of pursuant to the law of the decedent's state—7 Op. Att. Gen. 274. It is, however, generally conceded that a consular officer may intervene by way of observing the proceedings, and that he may be present on the making of the inventory.

In Moore's International Law Digest, Vol. 5, p. 123, a letter of Mr. Hay, Secretary of State, under date of February 3, 1900, is quoted to the effect that the right of a United States consular officer to intervene by way of observing proceedings in relation to the property of deceased Americans leaving no representatives in foreign countries, is not under-

estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and, at the expiration of one year from his decease, the residue.

"Fifth. To transmit the balance of the estate to the Treasury of the United States; to be holden in trust for the legal claimants; except if at any time before such transmission the legal representative of the deceased shall appear and demand his effects in their hands they shall deliver them up, being paid their fees, and shall cease their proceedings."

stood to involve any interference with the functions of a public administrator.

In this country the right to administer property left by a foreigner within the jurisdiction of a State is primarily committed to State law. It seems to be so regulated in the State of California, by giving the administration of such property to the public administrator. There is, of course, no federal law of probate or of the administration of estates, and, assuming for this purpose that it is within the power of the national government to provide by treaty for the administration of property of foreigners dying within the jurisdiction of the States, and to commit such administration to the consular officers of the nations to which the deceased owed allegiance, we will proceed to examine the treaties in question with a view to determining whether such a right has been given in the present instance.

This determination depends, primarily, upon the construction of Article 9 of the Argentine treaty of 1853, giving to the consular officers of the respective countries, as to citizens dying intestate, the right "to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." It will be observed that, whether in the possession, the administration or the judicial liquidation of the estate, the sole right conferred is that of intervention and that conformably with the laws of the country. Does this mean the right to administer the property of such decedent and to supersede the local law as to the administration of such estate? The right to intervene at once suggests the privilege to enter into a proceeding already begun, rather than the right to take and administer the property.

Literally, to intervene means, as the derivation of the word indicates [*inter*, between, and *venire*, come] to come between. Such is the primary definition of the word given in Webster's Dictionary and in the Century Dictionary. When the term is used in reference to legal proceedings, it covers the right of one to interpose in, or become a party to, a proceeding already instituted, as a creditor may intervene in a foreclosure suit to enforce a lien upon property or some right in connection therewith; a stockholder may sometimes intervene in a suit brought by a corporation; the government is sometimes allowed to intervene in suits between private parties to protect a public interest, and whether we look to the English ecclesiastical law, the civil law, from which the Argentine law is derived, or the common law, the meaning is the same.

In ecclesiastical law.—The proceeding of a third person, who, not being originally a party to the suit or proceeding, but claiming an interest in the subject-matter in dispute, in order the better to protect such interest, interposes his claim. 2 Chit. Pr. 492; 3 Chit. Commer. Law, 633; 2 Hagg. Const. 137; 3 Phillim. Ecc. Law, 586.

In the civil law.—The act by which a third party demands to be received as a party in a suit pending between other persons.

The intervention is made either for the purpose of being joined to the plaintiff, and to claim the same thing he does, or some other thing connected with it; or to join the defendant, and with him to oppose the claim of the plaintiff, which it is his interest to defeat. Poth. Proc. Civile, pt. 1, c. 2, § 7, no. 3.

In practice.—A proceeding in a suit or action by which a third person is permitted by the court to make himself a party, either joining the plaintiff in claiming what is sought by the complaint, or uniting with the defendant in resisting the claims of the plaintiff, or demanding something adversely to both of them. *Logan v. Greenlaw* (C. C.), 12 Fed. 16; *Fisher v. Hanna*, 8 Colo. App. 471, 47 Pac. 303; *Gale v. Frazier*, 4 Dak. 196, 30 N. W. 138; *Reay v. Butler* (Cal.), 7 Pac. 671. Black's Law Dictionary, p. 651.

Emphasis is laid upon the right under the Argentine treaty to intervene in *possession*, as well as administration and judicial liquidation; but this term can only have reference to the universally recognized right of a consul to temporarily possess the estate of citizens of his nation for the purpose of protecting and conserving the rights of those interested before it comes under the jurisdiction of the laws of the country for its administration. The right to intervene in administration and judicial liquidation is for the same general purpose, and presupposes an administration or judicial liquidation instituted otherwise than by the consul, who is authorized to intervene.

So, looking at the terms of the treaty, we cannot perceive an intention to give the original administration of an estate to the Consul-General, to the exclusion of one authorized by local law to administer the estate.

But it is urged that treaties are to be liberally construed. Like other contracts, they are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the States thereby contracting. *In re Ross, Petitioner*, 140 U. S. 453, 475.

It is further to be observed that treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one

country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms. For instance, where that was the purpose, as in the treaty made with Peru in 1887, it was declared in Article 33, as follows:

Until the conclusion of a consular convention, which the high contracting parties agree to form as soon as may be mutually convenient, it is stipulated, that in the absence of the legal heirs or representatives the consuls or vice-consuls of either party shall be *ex-officio* the executors or administrators of the citizens of their nation who may die within their consular jurisdictions, and of their countrymen dying at sea, whose property may be brought within their district.

And in the convention between the United States and Sweden, proclaimed March 20, 1911, it is provided:

In the event of any citizens of either of the two Contracting Parties dying without will or testament, in the territory of the other Contracting Party, the consul-general, consul, vice-consul-general, or vice-consul of the nation to which the deceased may belong, or, in his absence, the representative of such consul-general, consul, vice-consul-general, or vice-consul, shall, so far as the laws of each country will permit and pending the appointment of an administrator and until letters of administration have been granted, take charge of the property left by the deceased for the benefit of his lawful heirs and creditors, and, moreover, have the right to be appointed as administrator of such estate.

The Argentine treaty was made in 1853, and the Italian treaty in 1878. In 1894, correspondence between Baron Fava, the then Italian Ambassador, and Mr. Uhl, Acting Secretary of State, shows that the Italian Ambassador proposed that Italian consuls in the United States be authorized, as were the American consuls in Italy, to settle the estates of deceased countrymen. It was the view of the Department of State of the United States; then expressed, that, as the administration of estates in the United States was under the control of the respective States, the proposed international agreement should not be made. The Acting Secretary of State adverted to the practical difficulties of giving such administration to consular officers, often remotely located from the place where the estate was situated. See Moore's International Law Digest, Vol. 5, p. 122.

The learned counsel for the plaintiff in error, in his supplemental brief, has referred to a statement of the law of the Argentine Confederation of 1865, English translation published in Vol. 58, British and Foreign State Papers, p. 455, in which it is said that a foreigner dying intestate, without leaving a wife or lawful heirs in the Argentine Republic, or

where he dies leaving a will, the heirs being foreigners absent from the country and the executor being also absent, the consul of the deceased foreigner's nation is given the right to intervene in the arrangement of his affairs. In Articles III and IV it is declared:

III. Consular intervention shall be confined to—1st. Sealing up the goods, furniture and papers of the deceased, after giving due notice to the local authorities, provided always that the death has taken place within the Consular district.
2d. Appointing executors.

IV. The Consuls shall at once communicate to the testamentary Judge the appointment of such executors.

It is contended that the right secured to a foreign consul to appoint an executor under this Act of 1865 is evidence of the fact that the Argentine Republic is carrying out the treaty in the sense contended for by the plaintiff in error; but in this law certainly no right of administration is given to the consul of a foreign country. It is true, he may appoint an executor, which appointment it is provided is to be at once communicated to the testamentary judge.

In Article VIII the same law provides that executors shall perform their charge in accordance with the laws of the country. Article XIII declares that the rights granted by the law shall be only in favor of the nations which cede equal privileges to Argentine consuls and citizens.

Our conclusion then is that, if it should be conceded for this purpose that the most-favored-nation clause in the Italian treaty carries the provisions of the Argentine treaty to the consuls of the Italian Government in the respect contended for (a question unnecessary to decide in this case), yet there was no purpose in the Argentine treaty to take away from the States the right of local administration provided by their laws, upon the estates of deceased citizens of a foreign country, and to commit the same to the consuls of such foreign nation, to the exclusion of those entitled to administer as provided by the local laws of the State within which such foreigner resides and leaves property at the time of decease.

We find no error in the judgment of the Supreme Court of the State of California, and the same is affirmed.

BOOK REVIEWS

Das Seekriegsrecht nach der Londoner Deklaration vom 26 Februar 1909. Dr. Theodor Niemeyer. Berlin: J. Guttentag. 1910. pp. 39.

Die Kriegskonterbande in der Behandlung des Instituts für internationales Recht und nach der Londoner Erklärung über das Seekriegsrecht. Dr. Otto Beckenkamp. Breslau: M. & H. Marcus. 1910. pp. viii, 128.

These are two more of the many discussions which have been stimulated by the formulation of the principles of maritime international law by the International Naval Conference at London in 1908-9.

The little pamphlet of Professor Niemeyer is a résumé of two discourses. The efforts toward the establishment of an international prize court and the relations of the Hague Convention of 1907 to the Declaration of London of 1909 are explained. The main provisions of the Declaration are discussed. The application of the rules proposed at The Hague and at London receives attention. In the few pages Dr. Niemeyer gives in convenient form the main points in the recent development of maritime international law.

The longer book of Dr. Beckenkamp reviews the work of the Institute of International Law in building up the rules of contraband. The author points with pride to the contributions which the Germans have made to these efforts of the Institute. He shows the relation of the propositions before the Institute from time to time since 1873. The difficulties which naturally arose from the attempt to include under contraband what is now recognized under the term "unneutral service" are made clear. The question as to whether the carriage of contraband is a delict or simply a commercial risk was one to receive much consideration before it was decided to be the latter so far as public law was concerned. The able arguments of Perels and of Kleen receive particular attention. Dr. Beckenkamp regards the attainment of a unified opinion upon the law of contraband as one of the greatest advances in modern international law.

Twenty pages of appendices contain illustrative material. The appendices and text afford a view of the course of development in the direction of a conventional law for contraband.

GEO. G. WILSON.

International Law. By F. E. Smith and J. Wylie. London: J. M. Dent and Sons, Ltd. 1911. pp. i-xxxii, 391.

The work of Messrs. Smith and Wylie is a considerably enlarged reprint of a work published nearly twelve years ago; the original work, though somewhat condensed in form, covering in all less than two hundred pages, was in no sense a handbook but rather a lucid and concise presentation of the principles of international law as those principles were understood at the date of its publication. The work was well and conscientiously done, and the appearance of a new edition indicates that it has found a public sufficiently appreciative to warrant the preparation of a second edition, having nearly twice the space of the original work. The book, in both its old and new editions, has been prepared with great care, after a full consultation of authorities, and reflects no little credit upon its joint authors.

The list of authorities whose works have been cited in the preparation of the volume contains the American names of Wheaton, Kent, Halleck, Woolsey, and Wharton whose excellent *Digest of International Law* appears in the list. This compilation has played an important part in the practice of international law in the United States during the past thirty years, but has now been relegated to a place of minor importance by the appearance of the more elaborate and exhaustive work of Professor John Bassett Moore. Elsewhere in the text the work of Richard H. Dana, the learned editor of Wheaton, is referred to with evident appreciation.

In an introductory chapter, the history of the science is traced, followed by a brief but well-written chapter on the sources of international law, concluding with a statement as to its character and obligatory force which will prove acceptable to many American students of the subject.

To summarise briefly the views in this chapter as to the real nature of international law, it consists of rules to control relations which have a legal rather than a moral character; its treaties and controversies have assumed a legal guise, encouraged by a general willingness to increase their apparent obligatoriness, but it is habitually deficient in that coercive side of the term law, which is above all others essential and characteristic. All civilised nations agree that they are bound by its principles, and in the majority of cases find it convenient to observe them. On the other hand, these principles are not infrequently violated, and breaches may be consecrated by adding successful violence to the original offense. In reality the sources of its strength are three: (i) a regard — which in a moral community often flickers but seldom entirely dies — for national reputation as affected by international public opinion; (ii) an unwillingness to

incur the risk of war for any but a paramount national interest; (iii), the realization by each nation that the convenience of settled rules is cheaply purchased, in the majority of cases, by the habit of individual compliance.

In all, some 106 pages are devoted to the chapters covering the normal, peaceful relations of states, including the subject of treaties and conventions. The balance of the work is devoted to war, to "pre-belligerent acts," to questions relating to the outbreak of war, to the conduct of its operations on land and sea, and to the capture of private property as a legitimate act of war.

So much work has been done in recent years, in the way of international regulation of the several incidents of land and naval warfare by international congresses and conferences, that an author can hardly do better, in discussing some phases of the subject, than to follow substantially the newly adopted international codes; beginning with the Declaration of Paris in 1856 and ending with the Convention of The Hague in 1907. These instruments contain the generally accepted rules of war on land and, in some cases, regulate to some extent the similar operations of maritime warfare, though this branch of the subject is, from the nature of the case, less completely covered than is that of continental war. While our authors have, in the main, followed the texts of Geneva and The Hague, they have not been overawed by the dignity of those instruments and have given some very valuable data on the subject of maritime war, including the Admiral Aube incident of 1882. Out of an abiding sense of duty, attention is invited to a similar heresy which seems to have culminated in the British Navy during the summer manœuvres of 1888, but has long since ceased to disturb the dwellers of coast cities which, though undefended, seemed to present attractive opportunities for the levying of war contributions. Indeed the entire discussion of the subject of bombardments (pp. 132-138) is both satisfactory and exhaustive. The position of the United States in the matter of small-arm projectiles is stated with great clearness and accuracy.

The treatment of the subject of maritime capture and of the operations of war at sea is equally full and satisfactory. Considerable space is devoted to the work of the London Conference of 1907 and to the Declaration of London of the same year, in which the departures from the ancient rules of capture are fully embodied. It is not surprising that, in the leading naval Power of the world, this important instrument should have given rise to considerable discussion—the more as nearly all the chief stipulations of the convention were the results of difficult

and extensive compromises. The several clauses of the Declaration are discussed in order under the heads of contraband, blockade, and the right of search, together with the now familiar head of "unneutral service." Later in the work (Appendix C) a considerable portion of the text is devoted to the criticism, from the point of view of England as a belligerent and as a neutral, to which the Declaration has been subjected. As to this it may truthfully be said that if Great Britain, under the new convention, finds herself hampered both as a belligerent and as a neutral by the terms of the new Declaration, other states may readily accept it as a reasonable statement of the rights of belligerents in time of maritime war

GEO. B. DAVIS.

War Rights on Land. By J. M. Spaight. Preface by Francis D. Acland. London: Macmillan and Co. 1911. pp. xii, 520. \$3.75 net.

The author's purpose in writing this book is best given in his own words. He says:

My aim is to follow the operations of war, from the moment of the declaration to the final peace, in the guise of one who might be called upon to advise upon questions of war law; in short, to fulfil the functions which were assigned to the Japanese legal counsellors who accompanied the armies in the field in the war with Russia. I have therefore purposely confined myself to the consideration of such questions only as would probably come under the purview of such an adviser. The questions I deal with are those which might arise (they have not all arisen in any one war) and require to be answered on the spot, without reference to the home Government.

Into the nicer questions of legal theory arising, for instance, under Military Occupation, the author does not attempt to go. One object of this book is to present the war law to officers in an attractive form, which he considers might have been done "if the writers had insisted on the historical, human, and practical side, rather than on the legal and theoretical one." As we might expect from this statement, the style is not that of the conventional law text but is enlivened by occasional references to and quotations from literature, including poetry. If, at times, the manner of presentation is lacking in the dignity to which we are accustomed in law books, there are compensations in the freshness and vividness with which the matter is presented. The early writers on the law of nations secured its acceptance by appealing to the interest of the educated layman. Had they written otherwise their influence would have been slight. By using a similar method the author is likely to

appeal to officers and educated laymen generally and such a result is much to be desired.

The work is a commentary on the Hague Règlement, the Geneva Convention, the Hague Convention of 1907 relating to Neutrality in Land War and such other of the Hague conventions as come within the scope of the work. The articles covered by a particular chapter are given at the beginning of the chapter, and although this makes reference less easy than if the commentary followed each article, it possibly interferes less with the easy flow of the text.

The author has covered in a manner that is astonishingly thorough the incidents in war practice bearing on war law from the Crimean War to the present time. And this makes the work of great value, not only to the layman, but to the technical jurist as well. In his account of the "Fort Pillow Massacre" he has, however, probably shot beyond the mark. He has accepted Draper's account of that incident based on the Report of the Committee of Congress on the Conduct of the War as accurate, whereas that report goes even beyond the general run of statements given out by a belligerent as to the conduct of its adversary in partisanship and inaccuracy. A more accurate account of the affair may be had in Wyeth's *Life of Gen. Forrest* and Mathes' *General Forrest*.

There is evidence of an occasional slip in the proofreading, and on page 477 reference is made to the "Italian Jurist, Calvo," but the book is a valuable one, both in its historical references and its discussion of the views of legal writers, and should be of interest, not only to officers and laymen generally, but also to those more specially versed in the technique of international law.

PERCY BORDWELL.

The First Book of World Law. By Raymond L. Bridgman. Boston: Ginn & Co. 1911.

If it were possible to separate the theoretical statements contained in the present volume from the texts of international conventions which form the great body of the work, the compilation might perhaps be of service to those who are interested in the progress of the world towards relations of a closer and more pacific character. Unfortunately, however, the legal significance of the documents printed has been so mistakenly commented upon that attention must be called to the unscientific character of the publication. It is difficult to find out precisely what the author means by "world law" as distinguished from international law. The statements that "world law is the will of the world expressed officially"

(p. 7), that "on the basis of international law must rise world law as a higher expression of the agreement of the will of nations" (p. 8) would seem to indicate that by "world law" the author means such parts of the body of international law as have been *formally* ratified by nations. In assigning a "higher status" to this "world law" the author shows a strange partiality for formal declarations over long-established custom. It is like assigning a higher status to the statute law of a state than to its common law, however more fundamental might be the rights embodied in the latter. The misuse of the term "world law" becomes more serious when there are included under it such conventions as those providing for the Universal Postal Union, the Bureau of Weights and Measures, the Union for the Protection of Industrial Property, etc. As being formal agreements between the nations of the world they are part of the body of international law, but inasmuch as they relate to mere matters of mutual convenience they bear rather the character of international administrative regulations. To assign to them a "higher status" than to the unwritten law defining the fundamental rights of nations is as erroneous as it would be to regard patent rights defined by statute as more important than property rights defined by the common law of centuries. Moreover, although the conventions adopted at the Second Hague Conference deal with matters of political significance, the fact that they were signed subject to a total of sixty-two reservations, and the fact that any Power may denounce a given convention upon due notice, would seem to deny to those conventions a "higher status" than is possessed by those rules of international law which, though unwritten, are in universal acceptance among nations.

Such purely theoretical statements as that "sovereignty is an attribute of mankind as a whole [p. 10]. * * * Nations have no sovereignty over against world sovereignty [p. 11]. * * * It is no longer a question whether the whole human race shall be one organized political body [p. 7]," are too far removed from the facts of international life to be worth serious discussion.

C. G. FENWICK.

The Law of Domicile in its Relation to Succession. By Norman Bentwich. London: Sweet and Maxwell, Ltd. 1911. pp. xii, 204.

The title page of this volume describes the author as "Sometime scholar of Trinity College, Cambridge, and of Lincoln's Inn, Barrister-at-Law," and the preface indicates that he is a former pupil of Dr. Westlake. The preface adds that "This book is founded on the Essay which was

awarded the Yorke Prize at Cambridge University in 1910, and is published in accordance with the terms of the Prize," and that the author's "primary authorities have been the reports of the English cases," to which he has been guided by the use of text books on private international law. The table of cases includes some 350 reported decisions, which are referred to more or less fully in the text.

In the first chapters there is traced "the rise and decline, as it were, of the principle of domicile in its relation to succession," whereby movables belonging to a deceased person devolve according to the law of the country where he last had his domicile. At first it was in the discretion of the court as a matter of comity to apply this rule or not, "but the practice gradually became so regular that it had the force of law" (p. 5). The earliest reported English decisions bearing on the subject date from about the middle of the eighteenth century, a time when, however, the notion of domicile as distinguished from residence was not clearly established. Not until 1801, in the case of *Somerville v. Somerville*, was the rule in "favor of the application of the law of domicile to the distribution of the personal estate" (p. 9) finally settled.

This case also raised the question as to what constituted domicile, and while the court on this point held correctly that the domicile of origin remains until it has been clearly abandoned, it indicated the now generally considered erroneous doctrine that two domiciles may be simultaneously acquired. The author states that

The more exact determination of the doctrine [of domicile] was largely worked out in another branch of law by Sir William Scott (afterwards Lord Stowell). That great jurist, as head of the Admiralty Court during the Napoleonic wars, elaborated the idea of domicile in his prize decisions upon enemy property (p. 10).

It will be recalled, however, that the question before Lord Stowell in these decisions was the national character of the claimant in time of war. Can it be said that the same considerations govern the determination of this question as that of technical domicile in time of peace? Query, therefore, whether mere residence for purposes of trade is not sufficient to establish national character in time of war, and how much Lord Stowell's decisions on this point really contributed to the definition of domicile.

As to testamentary succession at the time of *Somerville v. Somerville*, the law was not yet clearly established that a will must satisfy the formal

requirements of the law of the domicile. This rule, however, was finally settled in *Stanley v. Bernes* (1831), and from then on for many years the law of the domicile governed the distribution and succession to personal property in both testacy and intestacy. But the harshness resulting from the strict enforcement of this principle was ameliorated in 1861 by Lord Kingsdown's Act, which declared valid wills conforming to the law of the place where made or of the domicile of origin as well as of the domicile of choice.

The last ten pages of the chapter are devoted largely to a historical review of the question whether a change of domicile requires a change of nationality. While several judges had previously expressed views in the affirmative, it was definitely decided in the famous case of *Udny v. Udny* (1869) that the two were entirely separate and distinct notions. The author says:

The decision is of great importance as defining the exact nature of a domicile of origin and its relation to a domicile of choice. * * * when a different domicile of choice is acquired, the domicile of origin is only in abeyance, reviving immediately the other is abandoned, and it continues until a second domicile of choice has been acquired (p. 22).

This conception of domicile of origin constitutes, he adds, the specially English character of domicile. The doctrine of *Udny v. Udny* stood until the time of *Huntly v. Gaskell* (1906) and subsequent decisions, which indicate a tendency again to confuse domicile with nationality and to cloud the distinction between the two so clearly pointed out in *Udny v. Udny*. Upon the Continent, on the other hand, the principle of domicile, the author says, "has not been so much modified as abandoned in favour of the principle of nationality" (p. 29). The existence of these two different principles has led to confusion in the law of succession where the deceased leaves personal property both in England and on the Continent.

From this interesting historical introduction the author passes to a discussion of the nature and definition of domicile in Chapter II on "The English Conception of Domicile." After an incomplete attempt at developing the notion of domicile, the author takes up the subheadings "Domicile of Married Woman" and "Domicile of Minor." Under the latter he strangely enough treats the domicile of ambassadors, consuls, soldiers, sailors and persons entering the service of foreign states. Then, under the subheading "Domicile of Choice," the definition of domicile is resumed:

The domicile of choice is determined by the two elements of the fact of residence and the will to remain, which must both be present to oust the domicile of origin conferred by law; * * * To constitute the domicile the choice must amount to a voluntary purpose, and the residence must not be prescribed by some external necessity. * * * A person can have but one domicile at a time for purposes of succession, and he can not be without one (pp. 36-37).

Some space is also given to a discussion of objections to the "criterion of domicile," which it would seem might properly have been included in the last chapter entitled "The Validity of the Principle of Domicile in Succession."

Under the subtitle "Oriental Domicile," the author handles a fascinating subject in an able manner and supports the proposition that the law of the domicile to which one becomes subject in Oriental non-Christian countries is "not the ordinary law of the land, but the law governing the special group to which he belongs" by virtue of special treaty provisions, or the consent of the local sovereign. He points out, however, that in the decision of the British Supreme Court in China in *Re Tootal's Trusts* (1883), approved by the Privy Council in the case of *Abdul Messih v. Farra* (1888), it was questioned whether domicile could be acquired in a country like China, and the court

held that the jurisdiction which the Emperor of China had permitted the British Crown to exercise over its own subjects in the country could not be considered as the law of a domicile, because the English community in China did not possess the supreme sovereign territorial power (p. 48).

But, he adds, the soundness of these decisions has been shaken by directly contrary decisions of the United States Court for China in *Re Allen's Will* (1907) and of the Supreme Court of Maine in *Mather v. Cunningham*.

In Chapter III on "Real and Personal Property," the author divides all property, as customary in private international law, into movables and immovables. Though the law of the domicile, he states, governs in general the succession to movable property and the *lex loci rei sitæ* remains supreme as regards immovable property, the chapter, however, is chiefly taken up with a consideration of the latter phase of the subject.

The author analyses his subject in the fourth chapter as follows:

Succession in English law comprises two separate and distinct stages which are subject to different principles of law. In the first place the estate of the deceased has to be administered, i. e., the right of succession must be legally approved, the debts of the deceased paid, and the fiscal duties charged upon the

estate must be satisfied. When this has been done, the surplus of the property is distributed among the successors, according to the directions of the deceased, if he left a will, and according to the law governing his intestacy if he left no will (p. 66).

And in this analysis may be seen the relations of the fourth and the succeeding three chapters: "Administration of the Estate" (Chapter IV), "The Effect of Domicile upon the Distribution of the Estate" in cases of (a) intestacy and (b) testamentary succession (Chapter V), "Limitations of the Regulation of the Succession by the Law of the Domicile" dealing with exceptions to the operation of the domiciliary law in regard to (a) the form of the will, (b) wills exercising a power of appointment, (c) wills affected by marriage settlements and marriage (Chapter VI), and "Death Duties and Domicile" (Chapter VII).

In Chapter IV the author makes this interesting statement: "It is the actual situation of the moveables when they are concrete chattels, and the place where they can be sued for or recovered when they are choses in action, that is the basis of jurisdiction" (p. 67) of English courts in granting or supervising administration. He adds:

The *lex fori*, and, in the case of immovables, the *lex situs*, govern the administration till it has been completed, and the balance of the estate is available for distribution. Then, and then only, the law of the domicile comes into operation (p. 67-8).

In practice, however, deference is paid, he points out, to whatever disposition the courts of the domicile have made in regard to the administration, as they are considered the seat of the primary administration of the personal property (p. 74).

The chapter on "Death Duties and Domicile" deals with the law governing the imposition of those charges which are levied by the government on property within its jurisdiction passing on the death of the owner such as, in England, estate duty, legacy duty and succession duty. This proceeding is regarded as a part of the administration of the estate, and therefore would logically be governed by the law controlling the administration. On the theory, therefore, that the state of the administration gives protection to the property physically within its jurisdiction or to the owner domiciled therein or claiming under its laws, wherever the property may be situated,

it not infrequently happens that the same property is subject to double imposts of the kind, levied both in the country of its actual situation and the country where it is deemed to pass beneficially (p. 151).

While the author suggests, as a means of obviating these double imposts, that states should accept (possibly by international agreement) some uniform principle upon which to levy fiscal dues, preferably that of domicile, as "It is the country of the domicile which most often in fact gives the protection to the movable property of the deceased" (p. 162), he points out that the tendency in recent years has not been in this direction, and believes that

So long as governments are continually looking for new sources of taxation, it is unlikely that they will agree to resign claims which are easily enforced, and which offer the additional attraction of making the foreigner pay (p. 163).

The choice of the particular law which shall govern a given subject is in some instances governed by different principles in different countries. For example, if a German domiciled in France brings a suit in an English court and the court decides that the law applicable to the case is the law of his domicile (French law), which law in turn provides that the law governing such a case shall be the *lex fori* (English law), the English court must decide which of the two principles for determining the choice of the law applicable to the case, it will follow. If it follows the principle in use in France, it will apply English law to the case, and we have an example of *Renvoi*, or the throwing back of the case upon the law of the court's country. If, however, the French law provides that the law governing such a case shall be the law of the plaintiff's nationality, the English court will apply German law to the case, and we have an illustration of *Rück-verweisung*, or the passing on of the case, as it were, to another jurisdiction. The method of resolving the conflict between principles of private international law is examined somewhat at length by the author in Chapter VIII, "The Doctrine of the *Renvoi* in Succession," and the conclusion is reached that British tribunals have shown, almost from the beginning, a tendency to apply the law and give judgment as if they were seated in the foreign country whose law they hold to be applicable to the particular case. In other countries, the author adds, "the balance of judicial opinion has strongly supported" the use of the *Renvoi*. He advocates the general acceptance of the doctrine of *Renvoi* as tending to secure the main object of private international law in respect to succession to movable property, namely:

to secure a unity in the distribution of the succession, so that the whole of the moveable estate of the deceased, at any rate, though situate in several jurisdictions, may be distributed on one system and subject to one law (p. 181).

In the last chapter of the book (Chapter IX) the author takes up "the Validity of the Principle of Domicile in Succession" and sets forth a number of considerations against England's giving up that principle and adopting in its place in conformity "with most of the Continental states the principle of nationality" (p. 189).

A not very complete index closes a small volume which, barring some faults of arrangement, ranks high in the estimation of the reviewer as a study of a legal topic, which the author hopes will be of use "to students of private international law * * * and * * * to those concerned in the administration of estates about which a question of domicile arises." True, the book is made up largely of a discussion of decided cases which are summarized, compared, distinguished if need be, and the underlying propositions of law, if any, uncovered before the reader's eyes, but this is a method too rarely met with in the law books of a time when the legal profession is bewildered by a multitude of isolated instances.

LESTER H. WOOLSEY.

The Alien Problem and its Remedy. By M. J. Landa. London: P. S. King & Son. 1911. pp. xv, 327.

The alien has found a sturdy champion in M. J. Landa, author of *The Alien Problem and its Remedy*. But if one is impressed with the author's sympathy and fervor in the alien's behalf, one is no less struck by his grasp of the subject discussed and the fulness and accuracy of his information. The book is in no sense a legal treatise; nor does it consider the political questions involved in the access of an alien population. The subject is treated altogether in its "social and economic aspects;" and the problem is dealt with only as it affects the British Isles. Within these limits, however, the survey is comprehensive.

If, as Mr. Landa says, the alien question in Great Britain is "largely statistical," the problem it presents does not appear alarming to one familiar with the immense figures representing alien immigration to the United States. In 1881, the total population of the United Kingdom in round numbers was 35,000,000, and the alien population numbered only 136,000. In 1891, the total population was 38,000,000; the alien population, 220,000. In 1901, the total population was 42,000,000, and the alien population, 287,000. In the decade between 1881 to 1891 there was an increase of but 84,000 in the number of aliens; and in the decade between 1891 and 1901 there was an increase of only 68,000.

According to the census of 1901 (the latest available at the time of publication), the several nationalities represented by the alien population were apportioned as follows:

Russian and Poles.....	95,245	Scandinavians.....	17,762
Germans.....	53,402	Austrians.....	10,130
Americans.....	29,180	Swiss.....	9,026
Italians.....	24,684	Dutch.....	7,115
French.....	22,406	Others.....	17,975

"The main increase," says the author, "was in Russians and Poles, who in England and Wales numbered 14,468 in 1881, increasing to 45,074 in 1891, and to 82,844 in 1901. There is no religious census in the United Kingdom, but it is certain that the majority of Russians and Poles are Jews."

A feature of British immigration, on which the author properly lays stress, is the so-called "transmigrant traffic," or "the passage through England of Continental emigrants making their way to non-European countries, chiefly America." "It is a huge traffic demonstrating what is mostly overlooked—that British vessels are the omnibuses of the seas; that Great Britain, owing to its geographical position and plentitude of coast-line, is a kind of international Capham Junction and clearing house for the reception and distribution of passengers and commodities to and from all parts of the world." The number of outgoing foreigners during recent years is given in the following table:

	TOTAL.	TO UNITED STATES (included in Total).
1905.....	188,422	152,835
1906.....	229,142	193,568
1907.....	239,040	196,126
1908.....	123,212	101,452
1909.....	185,617	150,233
1910.....	220,635	170,985

Striking a balance between incoming and outgoing aliens, and deducting from the arrivals, seamen arriving as passengers to join ships in British waters, who appear to be enumerated on landing but not counted when departing, the author arrives at the following figures, representing the annual net increase of alien population for the years mentioned:

	BALANCE OF ARRIVALS.	SEAMEN.	NET INFLUX.
1902	+ 25,181	15,962	+ 9,219
1903	+ 15,391	13,432	+ 1,959
1904	+ 2,207	12,863	- 10,656
1905	- 2,781	13,793	- 16,574
1906	+ 821	11,165	- 10,844
1907	+ 3,528	12,327	- 8,799
1908	+ 23,400	11,007	+ 12,393
1909	+ 20,903	9,380	+ 11,520
1910	+ 12,980	9,343	+ 3,637

There are chapters on "Overcrowding," "The Economic Aspects of Alien Labor," "The Standard of Living," "The Second Generation," and "Crime," but under none of these heads does the author find a serious problem presented. Reports of overcrowding are represented as greatly exaggerated, and such evils as were referable to this cause have been cured by local municipal regulations. Economically, the aliens are considered a benefit rather than a hurt; they develop trades and introduce new industries; the displacement of native labor is denied, as is the charge of lowering wages. The standard of living is represented as at least as high and frequently higher than that of many classes of the native population. Statistics are given showing that the number of aliens maintained at public expense — paupers, lunatics, vagrants, etc. — is relatively small. According to the author, alien vagrants are chiefly Americans. Nothing but praise is given to the "second generation." In regard to crime, he finds that conditions are improving, the percentage of alien prisoners having fallen from 2.25 per cent. in 1902 to 1.27 per cent. in 1909. Among criminals, says the author, Americans furnish the largest proportion.

In the author's view, the whole problem is due to "the uneven distribution of the aliens."

Nearly half of the alien population in 1901 was to be found in six Metropolitan boroughs, and Manchester, Liverpool and Leeds. In London the aliens represented 30 per 1,000 of the population, in Manchester 22 per 1,000, and only in eleven other towns and cities did they exceed 10 per 1,000. London had over half the Russians and Poles, 53,537, no fewer than 42,032 being in Stepney: over half the Germans, 27,427; over half the Austrians, 6,189; just about half the French, 11,264; nearly half the Italians, 10,889; but less than a quarter of the Americans, 6,244. In the East End Borough of Stepney, which includes in its boundaries the oft-mentioned districts of Whitechapel, Spital-

fields, Mile End, St. George's-in-the-East, Limehouse and Wapping, were to be found 54,310 of the 135,377 foreigners in the Metropolis: this represented 182 per 1,000 of the population, so that, despite the perpetual cry of Stepney being a "foreign city," over four-fifths were native. In 1881 there were 15,998, or 57 per 1,000 in Stepney, and in 1891, 32,284, or 113 per 1,000. To this growth and this aggregation "eastwards of the Bank" in the Hinterland of the landmark near the City border known as the Aldgate Pump the alien problem is due.

It may be assumed that in the author's estimation this matter of uneven distribution is not really a problem at all, since, except what is said in the chapter on overcrowding, no means are suggested for breaking up alien congregations in the congested centers and dispersing the alien population throughout the country.

The working of the British Alien Act of 1905 is exhaustively discussed, and proposals for new legislation are critically examined. The author is in favor of bringing about a more rigid exclusion of criminal and allied undesirable classes of aliens, and of resorting more frequently to the process of deportation with respect to such classes. He also favors legislation for the exclusion of contract laborers. Beyond this, apparently, he does not regard the further restriction of alien immigration as either necessary or desirable. In the chapter on "The Right of Asylum and the Status of the Alien" some legal questions are touched upon, but these relate almost entirely to matters of statutory construction.

CHARLES EARL

Reminiscences of the Geneva Tribunal of Arbitration, 1872 — The Alabama Claims. By Frank Warren Hackett. Boston: Houghton Mifflin Co. 1911. pp. xvi, 450. \$2.00 net.

Mr. Hackett's *Reminiscences of the Geneva Tribunal* is an interesting contribution to the literature of that arbitration and is timely. When so many foresee vague difficulties in the path of arbitration outlined by the treaties with Great Britain and France, it is well to look back to the much greater difficulties which were happily overcome by the Geneva Arbitration, at almost the beginning of modern arbitration.

For four long years this country suffered the horrors of civil war and made an appalling sacrifice of life and treasure to perpetuate our existence as a united country. For various reasons, commercial and political, the preponderance of sympathy of the governing classes in Great Britain was not with the Union, and the feeling was deep rooted that the Government of Great Britain had pursued an unfriendly attitude

towards this country and had neglected to observe those rules which ought to govern the conduct of neutral governments, with the result that our merchandise shipping was swept from the seas and the war with its untold misery and great expenditure in men and money was prolonged. Whether well founded or not, such is a mild statement of the more general feeling in this country in the years immediately following the close of the Civil War. This deep feeling of national injury came dangerously near that class of cases more or less vaguely called "questions of honor." The magnitude of the claim, too, put forth by some of our American statesmen, notably Mr. Sumner, was such as to almost foreclose the possibility of Great Britain accepting arbitration. That the two countries under the circumstances, at a time when the principle of arbitration was so little established, should have agreed to submit the questions at issue to an arbitral tribunal was an immeasurably bolder step than the project for general arbitration recently pending in the Senate.

The Geneva Arbitration is so notable in the history of arbitration that any contribution throwing light upon it will be acceptable to students of international relations; and such a book with the more popular characteristics of reminiscences is much more likely now than it would have been a few years ago to gain attention from the general reading public. Mr. Hackett had the unusual opportunity of watching at close hand the proceedings and of being in close touch with some of its principal actors. As secretary to Caleb Cushing, the senior counsel, he had an especially good opportunity for knowing "what was going on." The arbitrators, agents, and leading counsel of both governments have passed away and the list of surviving junior assistants is not large. It was a commendable ambition of Mr. Hackett to record these reminiscences for the benefit of others. Reminiscences, however, is a rather broad field of adventure and Mr. Hackett has not escaped the danger ever present of wandering too far afield from the subject selected. The first chapter, for example (pp. 1-17), are of so purely a personal character, including an adventure at the Chicago fire, as to not give the reader as favorable an impression of what follows as the book deserves. A side trip from Paris to London (pp. 111-121) has so little relation to the Geneva Arbitration as to really break the continuity of the book; and the last ten or a dozen pages detailing a purely personal trip through England with its visit to the Crystal Palace is not a happy conclusion with which to leave the reader. However, the writer of reminiscences is entitled to considerable latitude,

and though the book contains considerable that is not immediately pertinent to the Geneva Arbitration, for the most part it is interesting and calculated to throw light upon the great characters who participated in that arbitration; and some of the incidents are particularly illuminating with respect to important features of the proceedings.

Mr. Hackett very justly has great admiration for Mr. J. C. Bancroft Davis, the American agent, and his admirable preparation of the American Case. He devotes considerable space to the defense of the American Case, and particularly the inclusion in it of the charge that the attitude of Great Britain towards the United States during the Civil War was an unfriendly one. This position was deliberately assumed by the Government of the United States and undoubtedly correctly expressed the feelings of the American people. The charge of unfriendliness may not have been true in the full sense that our people thought it was; but it would seem difficult even at this late day, and it would have been much more so at the time, to say that the inclusion of that charge in the American Case was not a natural and proper thing. If true, it certainly was pertinent. Our government was making a charge that Great Britain had neglected to do what it ought to do, and hostile motive and insincere neutrality, if they existed, showed an animus relevant to the issue. The tone of the Cases of the two governments were naturally different in this regard, for, as Mr. Hackett says (p. 151):

The British case had no occasion to be aggressive. Great Britain came to Geneva to explain and defend,—not to lodge an accusation. Extenuation can best hope to be listened to where moderate and gentle terms are used to set it forth.

A particularly interesting part of the book is Chapters 6 and 7 ((pp. 159–265). These chapters treat of the controversy regarding the so-called Indirect or National Claims, and how by wise diplomacy it was finally agreed that the arbitrators should make a declaration, which it appeared represented their unanimous views, that these so-called indirect claims did not constitute upon principles of international law a good foundation for an award, and therefore upon principle ought to be wholly excluded from consideration by the tribunal in making its award, independently of its competency to pass on them under the treaty. We know now that the Government of the United States did not expect nor desire a favorable decision upon the merits of these claims, but the insistence of each side upon its own interpretation of the treaty, based upon an apparently honest misunderstanding, nearly wrecked the arbi-

tration. The suspension of the sittings of the tribunal, the proposals and counter-proposals for a practical solution of the difficulty, and the details of how it was all worked out are an interesting story and show what a little good sense and practical wisdom can do in such an emergency.

Mr. Hackett's book, which he himself only counts (p. 1) as a sidelight upon that memorable arbitration, will be useful to students of international subjects; but its greatest value will perhaps be to that portion of the general reading public, now happily increasing, which is becoming more and more interested in international arbitration. Very few such would have either the time or the patience to wade through the eight volumes relating to the Geneva Arbitration in the "Papers relating to the Treaty of Washington," including the British Case. The subject in fact is very concisely and ably treated in one chapter of less than two hundred pages (Chap. XIV of Vol. 1) by Prof. John B. Moore in his work on International Arbitrations, but being included in a professional work of several volumes the general reader might not in fact find it there. Whether for the expert or the general reader, we are glad that Mr. Hackett has preserved these reminiscences of the great Geneva Tribunal.

FRANK C. PARTRIDGE.

In't Zicht der Derde Vredesconferentie. Op anzoek van het Algemeen Nederlandsch Verbond bewerkt door. Jhr. Mr. B. de Jong van Beek en Donk. Dordrecht: Morks & Geuze. 1911. pp. vii + 229.

It is now generally recognized that a thorough preparation and discussion of the questions to be dealt with at an international gathering is one of the most essential elements in ensuring its effectiveness and success. Every effort, therefore, which would tend to facilitate the preliminary dispositions which the nations are to consider in 1913, before submitting them to the Third Hague Conference two years later, must be welcomed as a useful undertaking.

To contribute to a better understanding of some of the problems with which the Third Hague Conference will be concerned, as well as to call to the attention of the Dutch people their opportunity of playing a leading part, both in the preparatory labors and at the conference itself, the *Algemeen Nederlandsch Verbond* has asked Dr. B. de Jong to compile a number of extracts from writings of leading modern jurists, statesmen, and journalists, representative of their respective opinions on

some of the fundamental questions involved. Needless to say, therefore, that the book does not offer any one definite program for the Third Hague Conference, but is composed of a rather heterogeneous mass of material of necessarily very unequal value. From amongst the fifty odd writers quoted we select at random: Sir Edward Grey, Martens, Norman Angell, Fried, Roosevelt. The editor contributes the Introduction and a few explanatory remarks with each extract. An attempt is made to group the opinions under two headings: "Disarmament" and "International Police." Questions of a purely legal or technical nature are not touched upon. The main object of the book, the editor tells us, is to show the almost universal consensus of opinion that disarmament cannot be expected in the immediate future, and therefore people should not be disappointed if the Third Hague Conference, too, should fail in this respect. It is, however, possible to adopt measures which may ultimately bring about the realization of this great ideal. Chief among these, the editor thinks, would be an agreement establishing an international police force which would make the "sanction" of international law more tangible and ensure the faithful execution of the decisions of the International Tribunal. That, in the opinion of the editor, the Netherlands are destined to assume a leading rôle in this connection may be gathered from the fact that two articles on the subject by prominent Hollanders are reprinted *in extenso*. One by Mr. J. Kusters, *Wat kan Nederland op dit oogenblik voor de zaak der internationale Rechtspraak doen?* (What can the Netherlands do at the present moment for the cause of international arbitration?) pp. 69-97, and the other by Professor van Vollenhoven, *Roeping van Holland* (The Mission of Holland) pp. 103-125. The latter, in which it is proposed that the Netherlands should be entrusted with the formation of the international police, roused considerable opposition even in Holland, and some of the criticisms — which are also reprinted — may be useful in preventing hasty action.

As all writers are quoted in the original, a considerable portion of the book consisting of English, German, and French quotations may therefore be consulted without a knowledge of the Dutch language.

The chief value of the little book probably lies in the fact that it will, in a general way, do its share in preparing the ground for the more serious and laborious task of submitting to the nations definite proposals on all matters that should find a place in the program for the Third Hague Conference.

A. VAN HEMERT ENGERT.

The World's Peace. By Tadasu Saiki. London: Methuen & Co., Ltd., 36 Essex St., W. C. pp. vii, 238. Cloth: Price 6 sh.

This story, the author tells us, was written to help "improve the happiness of the world and cultivate better relations among the nations." The spirit of the work is that of good will to all mankind, and of broader humanity. It was written "especially for the American Nation," to correct what Mr. Saiki, a citizen of Japan, considers the "glaring inaccuracies" and "dangerous teaching" of certain publications of American authors who have, through ignorance and misunderstanding, dealt unreasonably with Japan.

Mr. Saiki begins his story with some general reflections on the recent affairs of the world, in which the principles that lie at the root of the work, come out clearly. These seem to be summed up in a single brief paragraph:

There shall be no real civilization or settled peace in the world until all the races not only respect themselves but also respect each other. And what is true of races is also true of religions.

Several pages at this point are devoted to reflections on the religious divisions and hostilities of the world, which the author believes to be most unfortunate. He holds that all religions are inspired and "all entitled to the respect of good men." As between science and religion he believes there can be no real want of harmony. They may move on different lines but "are shaped in the same direction." He holds the purely ethical view of Christianity and places it "on a level with the other religions of the world." What he says of religions, he believes also to be true of races and peoples. Universal peace between the East and the West will never come about "until the civilization of the West first recognizes that the East has a civilization also." Races and religions must be internationalized, or at least come to respect each other.

A considerable section of the story, which is carried forward thirty years to the year 1941, deals with the question, whether the United States can escape war with China. The author apparently believes such a war inevitable. With Japan, however, he declares that there has never been any danger of war, though the yellow journals have tried to bring one about, and have created some unpleasantness, but talk of war between Japan and the United States he considers "an insult to the morality and the intelligence of the two countries." With China, however, the case is different. He develops, *in extenso*, through the mouth of one of the

characters of the story, the various ways in which the Chinese in this country and at home have been treated, both by the government and the people of the United States, with injustice, contempt, and petty annoyances. He draws also with clear vision the manner in which China is being transformed to-day and is beginning to feel her power; how she is creating an army of well disciplined men, and a navy which Mr. Saiki prophesies is to be "equal if not superior to almost any other." He works in, also, the manner in which China is feeling the throbs of a new national spirit, is transforming herself into a constitutional government, and will soon be federating and consolidating the provinces of the empire.

Those Americans who have habitually cherished a contempt for China as a weak and disintegrated country, a "dying nation," destined to be sliced up by the European Powers, would do well to read what this clever, straightforward Japanese thinker says about what is going on in that land of four hundred millions of people. It is instructive to note that the recent remarkable developments in China, in the direction of a republic, follow closely, in many respects, the lines of Mr. Saiki's prognostication when he wrote this book some two years and more ago.

The point of view of Mr. Saiki, while generally cosmopolitan in a marked degree, is nevertheless Oriental. He feels deeply the injustices done to the Eastern races, formerly to the Japanese and now more especially to the Chinese. His keen criticisms of the United States, whether dealing with political or with industrial matters, are not mere vague tirades. They are direct and specific and are supported by numerous citations from journals and from the utterances of prominent men. He seems, however, on the whole to be fair toward this country and shows a marked appreciation of what this government and people have done for Japan.

In the prophecy which the author makes, in trying to forecast the history of the coming thirty years, he is careful not to go too much into details. He builds upon the present conditions, as he seems to see them, and imagines that things go on from bad to worse. China grows strong and self-reliant and determined to have justice done her. The United States declines to change her diplomatic policy, and the result is a war between the two countries. A great naval battle is fought for two days on the Pacific, two hundred miles northwest of Hawaii. The United States navy is defeated, losing several vessels, and retreats to the American shore. The Hawaiian Islands proclaim their independence, and the Chinese army finally gets inland beyond the Rocky Mountains. The

war drags on a long time and is finally brought to an end through pressure brought to bear on the United States and China by a combination of European Powers and Japan. In the treaty which follows it is agreed that the Asiatic and other races shall be treated equally with the white race in the United States, and that the Panama Canal shall be placed in the hands of an international syndicate and neutralized. The war is the last great war of the world, a war for peace, as Mr. Saiki declares.

In the latter half of the book the two principal interlocuters of the story, an old gentleman and a young man, continue their conversations at Nairobi, a place first introduced to the world by Mr. Roosevelt and recognized in the story as the centre of civilization. Their talk covers a very wide range of subjects, Eastern and Western, and the upshot of these conversations is generally a little more favorable to the Eastern civilization than to the Western. It is sometimes not a little difficult to find any coherence among the topics talked over, though such coherence really always exists at the back of the story.

The author, though considerably tinged with chauvinism, seems to be a devout believer in the cause of peace, and he attributes to the women of the world the chief rôle in bringing the Chinese-American war to an end, and in establishing a permanent peace order of the world. He advocates a general International Peace Holiday. A great International Women's Congress for the Peace of the World is held in Shanghai and has great weight in swaying the course of events. The Peace Conference at Nairobi, which ends the war, is completely successful, and the world enters upon a new era of peace.

A few pages toward the close of the book are devoted by the author to an explanation of his motives in writing the story. These pages are interesting and instructive and ought to be carefully studied by all who are devoted to international justice and peace.

A short appendix to the book gives the constitution of the "International Women's Association and Congress for the World's Peace," as Mr. Saiki conceives it ought to be formed.

The chief criticism of the work is that Mr. Saiki does not sufficiently take into account the movements and forces which are to-day operating with growing power against the old order, and which most pacifists believe will render a great war between the East and the West impossible, whatever may be the development of China in power and self-consciousness.

BENJAMIN F. TRUEBLOOD.

The International Law and Custom of Ancient Greece and Rome. By Coleman Phillipson. London: Macmillan and Co. 1911. 2 v., pp. xxiv, 419, and xvi, 421.

The writer of this scholarly work is already favorably known to students of international law as the author of two small volumes bearing the titles of *Studies in International Law* and *The Effect of War on Contracts*, respectively. He claims in the preface that the present work "offers to the reader the first comprehensive and systematic account of the subject (namely, the international law, public and private, of ancient Greece and Rome), that has appeared in any language."

The two volumes of Laurent on the *International Law and International Relations of Greece and Rome* (Vols. II and III of the *Études sur l'histoire de l'humanité* in 18 volumes, published during 1850-70) are undoubtedly chargeable with some of the defects pointed out in Phillipson's preface, but they also exhibit great qualities of heart and mind, and remain a remarkable monument to the energy, erudition, and noble purpose of their author. They are the work of a man who was an artist as well as a scholar, and they constitute an achievement which mere scholarship can never attain. In any case, it cannot be successfully maintained that the volumes of Laurent, whatever their defects, do not contain a more or less "comprehensive and systematic account" of the subjects of which they treat.

If our author's general attitude toward Laurent is wholly inadequate and very unjust, it must also be said that he fails to make out his case against his great predecessor on particular points. For example, in speaking of the Laws of Manu (Vol. II, p. 205), he cites Laurent as saying that they "savour of a profound Machiavellianism," and adds: "It would seem, in the eyes of this writer, that a nation or society which falls in practice below its idealistic theory is to be condemned beyond redemption." It would not require a very deep and searching examination of this old Brâhmin code to convince the reader that in this matter Laurent is wholly right and Phillipson absolutely wrong. It will, indeed, be sufficient to read the passages which the present reviewer has cited from Burnell and Hopkins' translation of *The Ordinances of Manu* in the October number of this JOURNAL for 1911 (5:904). However, it should be said in behalf of Mr. Phillipson that he is much better acquainted with the international practice of the Greeks and Romans than he appears to be with the Laws of Manu.

Another merit for his work claimed by the author (see preface) is

that it has been his constant aim "to bring out the juridical side of the subject, rather than to trace elaborately its historical development." This is an aim which becomes a barrister-at-law, and a task well worth undertaking, though it may well be doubted whether the harvest yielded by the application of the juridical mode of treatment is as fruitful as that which might have been produced by the use of the historical method.

However this may be, the results have amply justified the attempt. If there appears at times to be a lack of flesh and vitality, if dry bones and fossil remains seem often to predominate, this is doubtless due to the too exclusive use of the "juridical" method and to that lawyer-like habit of mind which seems incapable of breathing life into seemingly dead or inanimate things.

The subjects treated in twenty-eight successive chapters include such interesting and important topics as "The Greek City-State System," "Greek Conceptions of Law," the "*jus gentium*" and "*jus naturale*," "Greece and Foreigners," "Rome and Foreigners," "Ambassadors," "Right of Asylum," "Extradition," "Negotiation and Treaties," "Confederations and Alliances," "State Interest and Balance of Power," "Colonies," "International Arbitration," various phases of the "*jus belli*" of the Greeks and Romans, "Neutralization and Neutrality," the "*jus fetiale*," "Reprisals," and "Some Questions of Maritime Law."

It is impossible to deal with all or any of these matters in detail. Such subjects as the *jus gentium* and *jus naturale*, the relations of Greece and Rome with foreigners (to which are devoted eight chapters), the different kinds of treaties, international arbitration, and the various phases of the *jus fetiale* and the *jus belli* are treated very fully and adequately. The reader will find on pages 83-89 of Vol. II what seems to be the only fairly adequate account existing in English of that interesting mixed tribunal of international jurisdiction, known by the Romans as *recuperators* — a sort of permanent arbitral court for the application of commercial law. It should be especially noted that the field of international private law is not neglected in this work.

The weakest chapters are those dealing with historical matters. In particular the author appears to have little insight into the real character of Roman diplomacy, a subject on which he might have consulted Machiavelli and Montesquieu with great profit. For example, he remarks (I, 101): "Often she (Rome) protected weaker States." True, but always with an eye single to her own interests. The testimony

of witnesses like Cicero, Virgil, Livy, Bodin, and Bossuet in favor of the justice, equity, and good faith of Rome is almost valueless in the face of the enormous mass of historical evidence to the contrary. The author's own illustrations given in Chapter XVIII on "State Interest and Balance of Power" do not bear out his statement that "the interests of law and justice were paramount" amongst the Greeks and Romans (II, 90).

He cites (on p. 113 of Vol. II) the brilliant advocate Mommsen as saying: "It is only contemptible disingenuousness, or weakly sentimentality, which can fail to perceive that the Romans were entirely in earnest in the liberation of Greece," etc. He should also have cited the reply of the judicious Ihne to this outburst of Mommsen's. "These are hard words. But I am not afraid of being charged with 'contemptible dishonestly' or 'feeble sentimentalism' if I persist in thinking that the Roman senate was guided by 'political calculations' alone." (See Ihne's *History of Rome*, III, note on p. 80).

The attempt to prove the existence of a conception of the obligations of neutrality in a juridical sense (see pp. 303 ff.) must be pronounced a failure. The criticism of the opinion of M. Kleen (pp. 309-10) on this point is unjustified. The idea of neutrality undoubtedly existed amongst the Greeks, and they had words in which to express this idea, but they certainly had no sense of legal obligation in the premises.

Perhaps the most fundamental question raised by the author is whether the ancients had a system of international law in the strict or proper sense of this term. In view of the mass of material collected and evidence produced by writers like Laurent, Phillipson, Walker, and others, there is no longer room for reasonable doubt that the ancients, more particularly the Greeks, did possess more than the mere rudiments of such a system. But it was *a* system, not *our* system. A system such as ours could not possibly have been developed prior to the rise of the modern European State System, at the close of the Middle Ages, or during the fifteenth and sixteenth centuries of our era" (see this JOURNAL, 5:901), nor was it an important source of our system of international law, though many interesting and important analogies might be pointed out. In order, however, to trace a connection between different systems, it is not enough to point out the analogies. The connection must be actually shown, or evidence produced from which it may be at least inferred. Roman law, more especially the *jus gentium*, was unquestionably an important factor in the development of modern international law (see this JOURNAL, 5:921), but the assertion by Phillipson

(I, p. 106) that Roman *international* law furnishes "a great part of the groundwork of our modern system" is wholly erroneous.

As stated at the outset, this work is very scholarly, perhaps too much so for many students of international law who are not classical scholars. These would probably have preferred a translation to a paraphrase of the numerous citations (in the original) of authorities and documents so generously provided in the text and in the footnotes. The bibliography is, as Mr. Phillipson claims in his preface, probably "the fullest that has ever been presented."

Though the reviewer has felt bound to criticise the author's method, style, and viewpoint somewhat severely, he would not wish to leave the impression that he has an unfavorable impression of the work as a whole or that he considers it a mere piece of antiquarian research. On the contrary, he regards it as a very *important* contribution to a field in which the laborers are few and the harvest plentiful. He sincerely hopes that Mr. Phillipson will feel sufficiently encouraged by the reception of this work to "continue on somewhat similar lines with the preparation of further volumes on the development of international law in the middle ages and in modern times" (preface, *ad fin.*).

AMOS S. HERSHEY.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

[For table of abbreviations used, see Chronicle of International Events, p. 499.]

- Aerial navigation.* L'aviation au point de vue de la paix. *Charles Richet.*
La Paix par le Droit, 22:10. Jan.
- . Congrès juridique international de locomotion aérienne, tenu à Paris du 31 mai au 2 Juin 1911, résolutions. *R. gén. de dr. int. public*, 18:684.
- . Die Luftschiffahrt und das öffentliche Recht. *Alex. Meyer. Intern. Monatschrift*, 6:759. March.
- . Sovereignty or freedom of the atmosphere. *G. D. Valentine. Jurid. R.*, 23:324. Jan.
- . Le rôle militaire de la navigation aérienne. *E. Caslane. Grande R.*, 16:500. Feb.
- Africa.* Europe and the Muhammadan world. *H. H. Johnston. Cent.*, 70:1034. Dec.
- . British East African problems. *Sir Henry Seton Karr. 19th Cent.*, 71:312. Feb.
- Algeria.* L'exode des musulmans algériens. *H. Marchand. Q. dipl.*, 33:86. Jan.
- Alsace-Lorraine.* Les élections Alsace-Lorraine. *Pierre Braun. Q. dipl.*, 33:133. Feb.
- American Institute of International Law.* L'Institut Américain de Droit International. *R. gén. de dr. int. public*, 19:1. Jan.-Feb.
- Arbitration.* Arbitration treaties. *W. H. Taft. Natl. Geogr. M.*, 22:1165. Dec.
- . The arbitration treaties. *World's Work*, 23:363.
- . For peace with justice by arbitration. *W. T. Stead. R. of R. for Australasia*, Jan., p. 449.
- . General arbitration treaties. *C. C. Hyde. N. Amer. R.*, 195:1. Jan.
- . Pending arbitration treaties. *W. H. Taft. Cent.*, 83:459. Jan.
- . Une victoire de l'arbitrage. *J. Prudhommeaux. La Paix par le Droit*, 15:80. Feb.
- Armaments.* L'Allemagne et les armements. *Mem. dip.*, 50:93. Feb. 14.
- . L'armée et la marine des Etats-Unis. *A. de Tarlé. Q. dipl.*, 33:27,71. Jan.
- . The death knell of the National service scheme. *Archibald Hurd. Fort. R.*, 91(97):52. Jan.
- . "The Great Illusion." *Alfred T. Mahan. North Amer. R.*, 195:319. March.
- . Growth of expenditure on armaments. *Edgar Crammond. Quarterly R.*, 216:224. Jan.
- . Landesverteidigung und Flottenouvelle. *Die Grenzboten*, 71:253. Feb.

- . Militäranglichkeit und Industriestaat. *Alfons Fischer*. Zeit. f. Völkswirt. Socz. und Verwaltung, 21:74. Jan.
- . Die Mitwirkung der flotte bei der Landesverteidigung. *D. v. Janson*. Deutsche R., 37:257. March.
- . La politique militaire et navale du Japon. *R. Yamato*. Q. dipl., 33:156. Feb.
- . Der Schutz der deutschen Küste. Die Grenzboten, 71:101. Jan.
- . Ueber die Einschränkung der Rüstigungen. *Baron d'Estournelles de Constant*. Öster. Rundschau, 30:331. March.
- . Up and be doing. *L. Hale*. 19th Cent., 70:1190. Dec.
- Asia*. The Renaissance in Asia. *Bernard Houghton*. Westminster R., 177:1.
- Austria-Hungary*. Autriche-Hongrie. L'exposé du comte d'Aerenthal, à la Délégation Hongroise. Q. dipl., 33:115. Feb.
- . Die Politik des Grafen Aerenthal. *Freiherr v. Jettel-Eltenach*. Deutsche R., 37:284. March.
- Balkans*. La situation dans l'Albanie du Nord. Q. dipl., 33:237. Feb.
- . Der bosnisch-hercegovinische Lantag. *P. Milan*. Öster. Rundschau, 30:171. Feb.
- Belgium*. La question flamande. *Godefroid Kurth*. R. générale, 48:24. Jan.
- Belle Alliance*. Ueber die englische Politik nach der schlacht bei Belle Alliance. *J. v. Pflugt-Hartung*. Hist. Jahrbuch, 32:597. No. 3.
- Bigelow, John*. Estimate of John Bigelow. Ind., 71:1464. Dec. 28.
- . The first citizen of the Republic. Dial, 52:3. Jan. 1.
- . John Bigelow, gentleman. Outlook, 99:1044. Dec. 30.
- . Writings of John Bigelow. Nation [N. Y.], 93:609. Dec. 22.
- Bills of Exchange*. L'unification du droit relatif à lettre de change et au chèque à la conférence de la Haye de 1910. *J. C. Buzzati*. R. de dr. int. et de légis. comp., 13:49.
- British-American Pecuniary Claims Commission*. The British-American Pecuniary Claims Commission. Canadian Law Times, 32:67. Jan.
- Canada*. L'Allemagne au Canada. La France de Demain, 17:57. Jan.
- . Canada and foreign policy. Round Table, 1:493.
- . Canada's proposed copyright legislation. *W. A. Craick*. Canadian M., 37:215.
- . La nation Franco-Normande au Canada. Revue Franco-Américaine, 8:274. Feb.
- . La politique canadienne et les Canadiens français. *Louis Gerenvall*. Revue Franco-Américaine, 8:199, 295. Jan.-Feb.
- . The relations of the legislature to the executive power in Canada. *George M. Wrong*. Suppl. Amer. Pol. Sci. R. 6:173.
- Carnegie Endowment for International Peace*. Das Arbeitsprogramm der Carnegie-Stiftung. Friedens-Warte, 14:11. Jan.
- . La dotation Carnegie pour la paix internationale. Le bureau Européen. La Paix par le Droit, 22:3. Jan.
- . Program of the Carnegie Peace fund. World's Work, 23:373. Feb.
- . Foundation et dotation Carnegie en faveur de la paix, de l'arbitrage et du droit international. Clunet, 39:153.

- Casa Blanca*. Casablancasache. *Josef Kohler*. *Zeit. f. Völk. u. Bundes.*, 6:29.
- Cavour*. Il conti di Cavour. *C. Calisse*. *Rassegna Naz.*, 183:169. Jan.
- Cession of Territory*. Du droit de préférence accordé par un État à un autre État en cas de cession, échange ou vente de territoire. *Ernest Nys*. *Clunet*, 39:137.
- China*. Certain aspects of Chinese reconstruction. *Arthur H. Smith*. *An. of Amer. Acad. of Pol. & Soc. Sci.*, 39:18.
- . China's method of revising her educational system. *F. L. Hawks. Pott*. *An. of Amer. Acad. of Pol. & Soc. Sci.*, 39:83.
- . La Chine nouvelle. *R. P. L. Davront*. *Nouvelle France*, 11:108. March.
- . Chinese changes. *E. Seymour*. *Liv. Age*, 271:771. Dec. 30.
- . The Chinese revolution. *Tai-Chi Quo*. *An. of Amer. Acad. of Pol. & Soc. Sci.*, 39:11.
- . The constitutional history of Canada. *William R. Riddell*. *Amer. L. R.*, 46:24. Jan.-Feb.
- . Dr. Sun Yat Sen. Fugitive physician who caused the great upheaval in China. *Cur. Lit.*, 52:42. Jan.
- . An interpretation of China. *L. Y. Ho*. *An. of Amer. Acad. of Pol. & Soc. Sci.*, 39:1.
- . L'intervention de la Russie en Mongolie. *Q. dipl.*, 33:119. Jan.
- . Die Lage in China. Und dann? *M. v. Brandt*. *Deutsche R.*, 37:80. Jan.
- . Leaders of Chinese thought to-day. *R. of R.*, 45:91. Jan.
- . Manchus decline to leave Peking. *Cur. Lit.*, 52:20. Jan.
- . Die neuesten China. *Paul Rohrbach*. *Preussische Jahrbücher*, 47:213. Jan.
- . Observations in China. *J. C. White*. *Missionary R.*, 35:44. Jan.
- . Organization of political parties in Canada. *Herbert B. Ames*. *Supl. Amer. Pol. Sci. R.*, 6: No. 1, p. 181.
- . Present conditions in China. *F. McCormick*. *Nat. Geogr. M.*, 22:1120. Dec.
- . Las reformas en China. *P. A. Castrillo*. *España y América*, 10:42. Jan.
- . Republic of China. *World To-Day*, 21:1680. Jan.
- . Republican government in China. *Chester Lloyd Jones*. *An. of Amer. Acad. of Pol. & Soc. Sci.*, 39:26.
- . Revolution and mystery in China. *Chaut.*, 65:152. Jan.
- . La révolution chinoise. *Comte A. de Pouvoirville*. *La Revue*, 94:192. Jan.
- . La révolution chinoise. * * * *Études*, 130:173. Jan.
- . La révolution chinoise. *Raymond Recouly*. *R. pol. et parl.*, 71:160. Jan.
- . Les révolutions chinoises. *La Revue Jaune*, 2:10. Jan.
- . La révolution et les sociétés secrètes en Chine. *Albert de Pouvoirville*. *R. de Paris*, 19:119. March.
- . Where the Chinese are wanted: Hawaii. *R. of R.*, 45:106. Jan.

- . Will China break up? *H. A. Blake*. *Cent.*, 70:1102. Dec.
- . World's unrest. *World's Work*, 23:463. Feb.
- . Yuan Shih-kai and the last hope of the Manchus. *R. of R.*, 45:105. Jan.
- . Yuan Shih-Kai and the closing days of the Manchu. *A. Kinnosuké*. *R. of R.*, 45:177. Feb.
- . Young China. *J. O. P. Bland*. *National R.*, 59:70. March.
- Colombia*. Colombia. Chapter of national dishonor. *L. T. Chamberlain*. *N. Amer. R.*, 195:145. Feb.
- Colonies*. A propos du Kalanga: colons anglaise et colons belges. *Pierre Fort-homme*. *R. générale*, 48:37. Jan.
- . Castlereagh and the Spanish colonies. *C. K. Webster*. *English Hist. R.*, 27:78. Jan.
- . Ein Beitrag zur innern Kolonisation. *Josef Schmidt*. *Deutsche R.*, 37:252. Feb.
- . Eingeborenenrecht in den deutschen Kolonien. *Kurt Perels*. *Die Grenzboten*, 71:5. Jan.
- . Germany as a colonizing factor. *A. Wyatt Telby*. *United Empire n. s.*, 3:57.
- . Kolonien sind kein Ausland. *Z. f. Völk. u. Bundes.*, 6:35.
- Contraband of War*. La contrebande de guerre. *Henri Rollin*. *Nouvelle R.*, 26:51. March.
- . Francia. *Rassegna Naz.*, 183:483. Feb.
- . Les incidents du "Carthage" et du "Manouba." *Jacques Dumas*. *La Paix par le Droit*, 15:46. Jan.
- . Les incidents franco-italiens. *Q. dipl.*, 33:174. Feb.
- . Les incidents italiens. *Commandant de Thomasson*. *Q. dipl.*, 33:129. Feb.
- . Die Prisenfälle Carthage und Manouba vor dem Haager Schiedsgericht. *Friedens-Warte*, 14:68. Feb.
- Cossacks*. The past of the Russian Cossacks. *N. Jarintzoff*. *Fort. R.*, 91 (97): 172.
- Declaration of London*. Le rejet du Naval prize bill par la Chambre des lords. *Charles Dupuis*. *R. gén. de dr. int. public*, 19:58. Jan.-Feb.
- . Une opinion anglaise sur la Déclaration de Londres. *P. Evans Levcin*. *Q. dipl.*, 33:139. Feb.
- Egypt*. Lord Kitchener in Egypt. *Fort. R.*, 91 (97):507. March.
- . Egypt in New York. *E. Knaufft*. *R. of R.*, 45:60. Jan.
- Emigration*. Causes of Chinese emigration. *Pyau Ling*. *An. of Amer. Acad. of Pol. & Soc. Sci.*, 39:74.
- Espionage*. Condamnation en Allemagne pour espionnage des officiers anglais. *Brandon & Trench*. *Clunet*, 39:151.
- . Condamnation en Allemagne du capitaine français Lux pour inculpation espionnage. *Clunet*, 39:140.
- Extradition*. Extradition. Attentat à la pudeur avec violence et sans violence sur des enfants mineurs. *Traités franco-belges*. *Clunet*, 39:131.

- Extraterritoriality.* De la juridiction consulaire en pays de capitulations pendant une occupation militaire. *Clunet*, 39:169.
- . Extraterritoriality in China. *F. E. Hinckley*. *An. of Amer. Acad. of Pol. & Soc. Sci.*, 39:97.
- Europe.* Europe. East and West. A study of differences. *B. Fuller*. 19th Cent., 70:860. Nov.
- . Europäisches Unbehagen. *O. Umfrid*. *Völker-Friede*, 13:1. Jan.
- . Rom, Berlin und Paris. *Deutsche R.*, 37:322. March.
- Far East.* En Oriente. *Dott. Alete*. *Rassegna Naz.*, 183:288. Jan.
- Fiji.* Fiji as a Crown colony. *Sir Everard Im Thurn*. *Quart. R.*, 216:55. Jan.
- Foreign Judgments.* Les actes authentiques étrangers. Exécution en Roumanie. *Démètre Negulesco*. *Clunet*, 39:134.
- . Un État étranger (in specie l'Italie) peut-il pour suivre en France, par voie d'exequatur d'une Ordonnance de taxe rendue au profit du Tresor public étranger, le recouvrement de dépens de procès avancés à un "assisté judiciaire?" *M. Sicoré*. *Clunet*, 39:127.
- France.* Anglo-French Alliance? *Sydney Low*. *Fort. R.*, 90 (96):999. Dec.
- . Anglo-French relations. *E. S. Beesley*. *Postivist R.*, Feb., p. 38.
- . France and her Congo. *E. D. Morel*. *Contemp. R.*, 100:806. Dec.
- . Fransk Politik. *R. Besthorn*. *Gads Danske M.*, Feb., p. 314.
- Germany.* Die Deutsche Weltpolitik und England. *Die Grenzboten*, 71:353. Feb.
- . England and Germany. *Sydney Brooks*. *Forum*, 47:90. Jan.
- . Germany and England. *W. Michael*. *Contemp. R.*, 100:757.
- . England, Germany and common sense. *Sydney Brooks*. *Fort. R.*, 91 (97):147. Jan.
- . Krieg oder Frieden mit England. *Georg. Hartmann*. *Kolonische Zeitschrift*, 13:124.
- . Les relations anglo-allemandes. *Q. dipl.*, 33:236. Feb.
- . La rivalité de l'Angleterre et de l'Allemagne. *Michel Pavlovitch*. *Le Mouvement Socialiste*, 13:336; 14:53. Dec., 1911, Jan.
- . Made in Germany. *Sci. Amer.*, 105:550. Dec. 16.
- . Anglo-German differences and Sir Edward Grey. *J. Ellis Barker*. *Fort. R.*, 91 (97):447. March.
- . Lord Haldane and the Lorelei. *Austin Harrison*. *Empire R.*, 10:673. March.
- . The Empire and Germany. *Richard Jebb*. *United Empire n. s.*, 3:11.
- . Allgemeine Wehrpflicht und Präsenzstärke. *Eugen Nübling*. *Die Grenzboten*, 71:305, 358. Feb.
- . Les élections au Reichstag et la situation nouvelle des partis. *George Blondel*. *Le Correspondant*, 94:209. Jan.
- . Geist und Masse in der Geschichte. *Hans Delbrück*. *Preussische Jahrbücher*, 147:193. Jan.
- . Heeresfragen. *Hans v. Beseler*. *Preussische Jahrbücher*, 147:283. Feb.
- . Richtlinien unserer auswärtigen Politik. *Léopold Freiherrn v. Schlumbecky*. *Öster. Rundschau*, 30:380. March.

- . Les prochaines élections au Reichstag. *René Le Conte*. Q. dipl., 33:20. Jan.
- . La géographie électorale du Reichstag. *René Le Conte*. Q. dipl., 33:209. Feb.
- . Bismarcks letzte politische Idee. *Hans Delbrück*. Preussische Jahrbücher, 147:1. Jan.
- . Deutschland und der Verwilderung Italiens. *Süddeutsche Monatshefte*, 9:805. March.
- . The German elections. *J. W. Jenks*. R. of R., 45:54. Jan.
- . Germany of today. *Hugo Münsterberg*. N. Amer. R., 195:182. Feb.
- . Germany's foreign trade. *J. D. Whelpley*. Cent., 83:485. Feb.
- . International situation today: a German view. R. of R., 45:233. Feb.
- . The Reichstag election: A letter from Berlin. *Robt. Crozier Long*. Fort. R., 91(97):131. Jan.
- . Die Reichstag und die äussere Politik Deutschlands. *R. Gädke*. Friedens-Warte, 14:43. Feb.
- . La France et l'Allemagne devant l'histoire. *Joseph Renach*. Revue Bleue, 50:1, 36, 68. Jan.
- . L'Angleterre contre l'Allemagne. *E. Lémonon*. Revue Bleue, 50:83. Jan.
- . Die deutsch-englische Verständigung. *Deutsche R.*, 37:129. Feb.
- . Die deutsche Weltpolitik und England. *Die Grenzboten*, 71:353. Feb.
- . Deutschland und England. *Ladon*. Die Zukunft, 20:307. March.
- . Deutschland und England. *Wolfgang Michael*. Deutsche Rundschau, 38:217. Feb.
- . Deutschland und England. Von einem hochstehenden reichsdeutschen Politiker. *Öster. Rundschau*, 30:325. March.
- Ghent, Treaty of*. Cento anni di pace anglo-americana. *Angelo Crispi*. La Vita Int., 15:35. Jan.
- Great Britain*. Mr. Balfour's farewell. *Wilfred Ward*. Dublin R., 150:1. Jan.
- . Anglo-Russian progress. *Baron Heyking*. Fort. R., 91 (97):107. Jan.
- . Cynicism triumphant. *J. F. Green*. Concord, 29:2. Jan.
- . Eleven years of foreign policy. *Sir Wm. H. White*. 19th Cent., 71:217. Feb.
- . End of the dual control. *A. A. Bauman*. Fort. R., 90 (96):991. Dec.
- . Foreign office autocracy. *Sidney Low*. Fort. R., 91 (97):1. Jan.
- . Greater Britain in 1911. A retrospect. *Pelops*. United Empire, n. s., 3:44.
- . Great Britain. Foreign affairs, 1911. *By Diplomatist*. Empire R., 22:371.
- . Home rule. England's great crisis. *World To-Day*, 21:1882. March.
- . Material interests and sentiment. *Joseph Finn*. Concord, 29:4. Jan.
- . New leaders for old. *Curio*. Fort. R., 90 (96):979. Dec.
- . Sir Edward Grey and England's foreign policy. *W. T. Stead*. R. of R., 45:199. Feb.
- . Sir Edward Grey's stewardship. *Diplomaticus*. Fort. R., 90 (96):963. Dec.

- . United Kingdom and the Empire. *F. Ware*. 19th Cent., 70:1178. Dec.
Great Britain-Germany. See *Germany*.
- Hague Conventions*. Article 23 (h) of the Hague Convention No. IV of 1907.
Thomas E. Holland. *Law Q. R.*, 28:94.
- . The defence of alien enemy and Article 23 (h) of the fourth Hague
Convention. 1907. *A. H. Charteris*. *Jurid. R.*, 23:307.
- . Lois et coutumes de la guerre sur terre. Interprétation de l'article 23
du règlement de la Haye. *E. T. Holland*. *R. gén. de dr. int. public*, 19:120.
Jan.-Feb.
- Hague Peace Conference*. Pour la troisième Conférence de la Paix. *Charles
Richet et Th. Ruyssen*. *La Paix par le Droit*, 15:97. Feb.
- Holy See*. Quelques idées sur la condition internationale de la Papauté. A
propos de l'affaire du drapeau pontifical et de l'arrêt de la Cour de cassation
du 5 mai 1911. *Gilbert Gidel*. *R. gén. de dr. int. public*, 18:589.
- Hungary*. Die auswärtige Politik der ungarischen Révolution 1848-49. *Wilhelm
Alter*. *Deutsche Rundschau*, 38:55, 227. Jan., Feb.
- Immigration*. The American miracle. *M. Antin*. *Atlantic*, 109:52. Jan.
- . Future of American ideals. *P. F. Hall*. *N. Amer. R.*, 195:94. Jan.
- . Immigration and crises. *H. P. Fairchild*. *Econ. R.*, 1:753. Dec.
- . L'immigration japonaise aux Etats-Unis, traité de commerce du 21
février 1911. *Karl Strupp*. *R. gén. de dr. int. public*, 18:675.
- . Making a citizen. *M. Antin*. *Atlantic*, 109:211. Feb.
- . Our immigrants and the future. *E. D. Durand*. *World's Work*, 23:
431. Feb.
- . Real significance of recent immigration. *W. J. Lauck*. *N. Amer. R.*,
95:201. Feb.
- Imperial Conference*. The Conference and the Empire 1887-1911. Round Table,
1:371.
- India*. Appointment of judges in India. *J. D. Anderson*. *East & West*, 11:
119. Feb.
- . Changes in India. *Sir Andrew Fraser*. 19th Cent., 71:48. Jan.
- . Crown, government and Indian princes. *S. K. Ratcliffe*. *Contemp. R.*,
100:782. Dec.
- . Delhi: ancient and modern. *Rai Bahadur Lala Baij. Nath*. *East &
West*, 11:105.
- . The Gaekwar of Baroda. *R. of R.*, 45:133. Feb.
- . The government of India problem. *J. Beattie Crozier*. *Fort. R.*, 91
(97): 9. Jan.
- . How King George could win the hearts of the Hindoos. *Sudami Bābā
Bhārati*. 19th Cent., 71:58. Jan.
- . Kande subdivision. Helping to govern India. *Charles Johnston*. *At-
lantic*, 109:265. Feb.
- . The King-Emperor's visit: A new epoch. *H. R. Mody*. *East & West*,
11:128. Feb.
- . Lord Hardinge's partition of Bengal. *Empire R.*, 22:1.
- . The Mishnii mission. *Angus Hamilton*. *Fort. R.*, 91 (97):553. March.
- . The new India. *A. E. Duchesne*. *Empire R.*, 23:20. Feb.

- . What the British have done for India. *S. N. Singh*. *R. of R.*, 45:65. Jan.
- Indo-China*. L'évolution nécessaire en Indô-Chine. *Pierre Khorat*. *Le Correspondant*, 80:417. Feb.
- Industrial Property*. De la procédure protectrice de la propriété industrielle et commerciale des étrangers en Egypte. *A. de la Pommeraye*. *Clunet*, 39:102.
- . Régime international de la protection de l'art appliqué à l'industrie. *A. Pillet et G. Chabaud*. *Clunet*, 39:89.
- Industrial Unrest*. Public opinion and industrial unrest. *A. Clay*. 19th Cent., 70:1005. Dec.
- Institut de droit International*. Institut de Droit International. Session de Madrid avril 1911. *C. Dupuis*. *R. gén. de dr. int. public*, 18:621.
- Insurance*. Des assurances maritimes en temps de guerre. Point de vue anglais. *Clunet*, 39:84.
- International law*. Les derniers essais de codification internationale. *Jacques Dumas*. *La Paix par le Droit*, 15:67. Feb.
- . Histoire littéraire du droit international. *Josse van Clichtove*. Notice par Ernest Nys. *R. de dr. int. et de légis. comp.*, 13:601.
- . The Moslem international law. *Syéd H. R. Abdul Majid*. *Law Q. R.*, 28:89.
- . Report of the Committee on International law. American Bar Association. *Charles Gregory Noble*. *Yale L. Journ.*, 21:193.
- . Le rôle des particuliers dans l'œuvre de la codification du droit international. *Elihu Root*. *R. de dr. int. et de légis. comp.*, 13:445.
- . De toekomst van het volkenrecht. *J. de Louter*. *De Gids*, Feb., p. 224.
- . International law in the Italian-Turkish war. Commencement of hostilities. *A. H. Charteris*. *Jurid. R.*, 23:355. Jan.
- International Relations*. The place of force in international relations. *A. T. Mahan*. *N. Amer. R.*, 195:28. Jan.
- Intervention*. American intervention in West Florida. *Isaac J. Cox*. *Amer. hist. R.*, 17:290.
- Italy*. Fifty years of Italian independence. From Naples to Tripoli. *H. Nelson Gay*. 19th Cent., 71:148. Jan.
- . Der italienische Nationalismus und der tripolitanische Feldzug. *Öster. Rundschau*, 30:257. Feb.
- . Italy's policy and her position in Europe. *J. Ellis Barker*. *Fort. R.*, 91 (97):11. Jan.
- Japan*. Relations of Japan with the United States. *D. S. Jordan*. *Pop. Sci.*, 80:151. Feb.
- . La situation financière et économique du Japon. *René Séjourné*. *Q. dipl.*, 33:227. Feb.
- Jews*. Jew and Chinaman. *W. Trant*. *N. Amer. R.*, 195:249. Feb.
- . "The National Review and the Jews." *H. Pereira Mendes*. *National R.*, 59:184. March.
- . Russian Consul-General. [Baron A. Heyking] and the Russian Jews. *S. Gilberg*. *Fort. R.*, 91 (97):543. March.

- Manchuria.* One solution of the Manchurian problem. *Putnam Weale.* An. of Amer. Acad. of Pol. & Soc. Sci., 39:39.
- Mexico.* Bandit governed Mexico. *R. Barry.* World To-Day, 21:1589. Jan.
- . Declaration of causes for taking up arms against Mexico, 1835-6. Quart. of Texas State Hist. Assoc., 15:173.
- . Mexiko und die Vereinigten Staaten. *Franz Erich Junge.* Das Echo, 31:1018. March.
- . New Government needed. *E. T. Simondetti.* World To-Day, 21:1601. Jan.
- Mongolia.* Chine et Russie en Mongolie. *Armand Kergant.* Q. dipl., 33:213. Feb.
- . La Russie et la Mongolie. *Revue Jaune*, 2:3. Jan.
- Morocco.* L'accord franco-allemand et le Maroc. *Raymond Reccouly.* R. pol. et parl., 71:150. Jan.
- . L'action de la France au Maroc après l'accord franco-allemand. *J. La Dreit de Lacharrière.* R. pol. et parl., 71:59. Jan.
- . Les accords franco-allemands et les négociations marocaines. *Auguste Terrier.* L'Afrique française, 22:15, 60. Jan., Feb.
- . L'affaire marocaine. Q. dipl., 33:44, 106, 179, 239. Jan.-Feb.
- . The aftermath of Agadir. Suggestions for a settlement of territorial ambitions. *Sir Harry H. Johnston.* 19th Cent., 71:191.
- . After Morocco. *By Diplomatist.* Empire R., 10:10. Feb.
- . L'appel du Maroc. L'Afrique française, 22:3. Jan.
- . Après la crise. *Pierre Nathan-Larrier.* La Paix par le Droit, 15:108. Feb.
- . Le compromis franco-allemand devant la Chambre. Commandant de Thomasson. Q. dipl., 33:40, 65. Jan.-Feb.
- . Die deutsche congolische Verständigung. *Deutsche R.*, 37:129. Feb.
- . La discussion de l'accord franco-allemand à la Chambre des Députés. *J. Prudhommeaux.* La Paix par le Droit, 15:49. Jan.
- . France and Germany. Morocco and Congo. *Contemp. R.*, 100:869. Dec.
- . Germany and France with special reference to the Moroccan question. *J. H. von Bernstorff.* Outlook, 100:123. Jan. 20.
- . La Germania e el Marocco. *Civiltà Cattolica*, Num., 1479:351. Feb.
- . Die Geschichte der deutschen Marokkopolitik im Lichte von Bismarcks Orientpolitik. *Maximilian v. Hagen.* Deutsche R., 37:104, 231. Jan.-Feb.
- . Die Marokkofrage und was sie uns lehren könnte und follte. *M. von Brandt.* Deutsche Rundschau, 38:32. Jan.
- . The most Christian Powers. *Sydney Low.* Fort. R., 91 (97):414. March.
- . Le point de vue espagnol dans les négociations de Madrid. *J. Causse.* Q. dipl., 33:11. Jan.
- . Quelques opinions allemandes sur le récent accord. *C. Meillac.* Le Correspondant, 94:352. Jan.
- . Les réformes militaires au Maroc. *Reginald Kann.* R. de Paris, 19:205. March.

- . Sobre el acuerdo franco-alemán y la crisis francesa. *Mariano Marfil*. *Nuestro Tiempo*, 12:100. Jan.
- . Le traité Franco-Allemand au Sénat. *Mem. dipl.*, 50:85. Feb. 14.
- . True story of the Morocco negotiations. *E. D. Morel*. 19th Cent., 71:233. Feb.
- . La zona de influencia española en Lareche y el gobierno marroquí. *Francisco Lozano Muñoz*. *Nuestro Tiempo*, 12:5. Jan.
- Most Favored Nation Treaties*. Canada and the Most Favored Nation Treaties. *O. D. Skelton*. *Queen's Q.*, 19:231. Jan.-March.
- Nationality and Citizenship*. British citizenship. *United Empire*, n. s., 3:65.
- . De la naturalisation obligatoire comme remède à l'afflux des étrangers en Suisse. *Clunet*, 39:98.
- Netherlands*. De opleiding onzer meisjes en het rapport van de staats commissie voor het onderinjs. *W. A. Naber*. *De Gids*, 38:87. Nov.
- Neutrality*. Requisitionen von neutralem Privateigentum insbesondere von Schiffen. *Erich Algrecht*. *Z. f. Volk. und. Bundes.*, Beiheft I zum VI Band.
- . Le convenzioni dell'Aja e la neutralité. *G. C. Buzzati*. *La Vita Int.*, 15:30. Jan.
- Nobel Prizes*. Distribution of the Nobel prizes. *World's Work*, 23:381. Feb.
- North Atlantic Coast Fisheries Arbitration*. Un triomphe de l'arbitrage. *Luis Drago*. *R. gén. de droit int. public*, 19:5. Jan.-Feb.
- Open Sea*. La baie d'Hudson est elle une mer libre ou une mer fermée? *Thomas Willing Balch*. *R. de dr. int. et de légis. comp.*, 13:539.
- Opium Conference*. Background of the Opium Conference at the Hague. *E. F. Baldwin*. *R. of R.*, 45:214. Feb.
- Pan America*. American diplomacy in Central America. *Philip M. Brown*. *Suppl. Amer. Pol. Sci. R.*, 6:152.
- . Caribbean derelict. *W. P. Livingstone*. *N. Amer. R.*, 195:261. Feb.
- . The point of view of Latin America on the Inter-American policy of the United States. *Henry Gil*. *Suppl. Amer. Pol. Sci. R.*, 6:164.
- . La politique américaine du Brésil. *Henri Lorin*. *Q. dipl.*, 33:95. Jan.
- Panama Canal*. Le canal de Panama et les colonies françaises. *Léon Jacob*. *Q. dipl.*, 33:19. Feb.
- . Der Panamakanal und seine Bedeutung. *Hauptmann Smend*. *Deutsche R.*, 37:244. Feb.
- . Panama and Erie canal locks. *D. A. Willey*. *Cassier*, 40:761. Dec.
- . Prospective Panama Canal. *G. H. Forbes Lindsay*. *Lippincott's*, 89:76. Jan.
- . Year's progress on the Panama Canal. *Eng M.*, 42:405. Dec.
- Passports*. L'incident russo-américain relatif aux passports des juifs russes émigrés et naturalisés aux États-Unis. *Clunet*, 39:159.
- . The treaty of 1832. [United States-Russia] *R. of R.*, 45:23. Jan.
- Peace*. The complete pacifist. *Edward G. Smith*. *Concord*, 29:14. Jan.
- . Frieden und Unfrieden. Von einem österreichischen Politischen. *Deutsche R.*, 37:26. Jan.
- . Moderne Friedensschlüsse. *Alfred H. Fried*. *Friedens-Warte*, 14:41. Feb.

- . Pacifisme! *Frédéric Passy*. *La Paix par le Droit*, 15:65. Feb.
- . Der Pazifismus in Italien. *Paolo Baccari*. *Friedens-Warte*, 14:56. Feb.
- . Peace and heroism. *H. M. Chittenden*. *Forum*, 47:185. Feb.
- . Der Pflicht der Professoren. Zu neuerlichen Aeuszerungen der Professoren Delbrück und Zorn. *O. Umfrid*. *Friedens-Warte*, 14:14. Jan.
- . Ein Vorläufer des wissenschaftlichen Pazifismus. *Ellen Key*. *Friedens-Warte*, 14:50. Feb.
- . Who is responsible? *Felix Moschelless*. *Concord*, 29:1. Jan.
- . Wie man Kriegsstimmung erzeugt. *Ed. Bernstein*. *Friedens-Warte*, 14:2. Jan.
- . Windecker Friedensschlüsse 1372-1373. *Z. f. Völk. u. Bundes.*, 6:41.
- . Why we are not discouraged. *Baroness Bertha von Suttner*. *The Peace Movement*, 1:24. Feb.
- Persia*. American adventure in Persia. *World's Work*, 23:379. Feb.
- . Durch Persien und Russisch-Turkestan. *Deutsche Rundschau*, 38:251, 423. Feb., March.
- . How Russia began her penetration of Persia. *R. of R.*, 45:221. Feb.
- . Our Persian Policy. *Philip Morrell*. 19th Cent., 71:40. Jan.
- . Persia and the Drago Doctrine. *Canadian Law Times*, 32:64. Jan.
- . Persia, Russia and Shuster. *R. of R.*, 45:49. Jan.
- . Shuster's war with Russia and Britain. *Cur. Lit.*, 52:14. Jan.
- . W. Morgan Shuster's war with Russia and Britain. *Cur. Lit.*, 52:15. Jan.
- . Significance of the Persian question. *Roland G. Usher*. *Atlantic*, 109:332. March.
- Portugal*. Anti-clerical policy in Portugal. *Camillo Forrend*. *Dublin R.*, 150:128. Jan.
- . Espagne, Grande-Bretagne et Portugal. Tentative de restauration monarchique en Portugal. *M. Perrinjacquet*. *R. gén. de dr. int. public*, 18:666.
- . Prince Henry of Portugal and his political, commercial and colonizing work. *C. R. Beazley*. *Am. Hist. R.*, 17:252. Jan.
- Private International Law*. Doctrines of private international law in England and America contrasted with those of continental Europe. *Arthur K. Kuhn*. *Columbia Law R.*, 12:44. Jan.
- Reciprocity*. Why Canada rejected reciprocity. *A Canadian*. *Yale R.*, n. s., 1:173. Jan.
- Russia*. Russian assendeney in Europe and Asia. *Cecil Battine*. *Fort. R.*, 91(97):437. March.
- Salutes*. Des honneurs et saluts à rendre par les navires de guerre aux autorités françaises et étrangères. *G. Lyon*. *Clunet*, 39:109.
- Santo Domingo*. Les finances de Saint-Domingue et le contrôle américain. *A. de la Rosa*. *R. gén. de dr. int. public*, 19:73. Jan.-Feb.
- Sea Power*. The command of the sea. *J. B. Askeu*. *Concord*, 29:6. Jan.
- . Development of the American Navy. *Cassier*, 40:766. Dec.
- . German sea power: its past and future. *R. of R.*, 45:229. Feb.
- . One duty. One combined work. *Blackwoods*, 190:852. Dec.

- . Importance of the command of the sea. *A. T. Mahan*. *Sci. Amer.*, 105:512. Dec. 9.
- . Die Suprematie im Mittelmeer. *Konteradmiral A. D. E. Kalau von Hose*. *Deutsche R.*, 37:3. Jan.
- . The verdict of the admirals. Lord Charles Beresford and Admiral Mahan on the Naval crisis. *By Navalists*. *National R.*, 59:55. March.
- Spitzbergen*. The Spitzbergen question. *Pierre Clerget*. *The Peace Movement*, 1:47. Feb.
- Taft*, Wm. H. President Taft. *Atlantic*, 109:164.
- Texas*. British correspondence concerning Texas. *Ephraim Douglas Adams*. *Quart. of Texas State Hist. Assoc.*, 15:210.
- Trade*. American commercial interests in Manchuria. *Dana G. Munro*. *An. of Amer. Acad. of Pol. & Soc. Sci.*, 39:154.
- . British trade prospects in China. *Stafford Ransome*. *United Empire*, n. s., 3:53.
- . The open door. *Frederick McCormick*. *An. of Amer. Acad. of Pol. & Soc. Sci.*, 39:56.
- Treaties*. La convention franco-belge du 8 juillet 1899. *Henri de Cock*. *R. de dr. int. et de légis. comp.*, 13:476.
- . Die deutschfeindliche Hintergedanke bei den amerikanischen Schiedsverträgen. *Friedens-Warte*, 14:48. Feb.
- . Du traité diplomatique conclu entre la France et le Japon pour régler la protection des droits de leurs ressortissants sur le territoire d'une puissance tierce. *G. Cluzel*. *Clunet*, 39:74.
- . Ein japanisch-chinesischer Handelsbund? *Das Echo*, 31:990. March.
- . Le traité anglo-américain d'arbitrage de 1897. *A. André*. *R. gén. de dr. int. public*, 18:654.
- . Treaties and their value. *R. of R.*, 45:132. Feb.
- . The treaty of 1832. *R. of R.*, 45:23. Jan.
- . The Treaty of Charlottenburg. *J. F. Chance*. *English Hist. R.*, 27:52. Jan.
- Triple Alliance*. Italy, Oesterreich und der Driebund. *Benedetti Cirmeni*. *Deutsche R.*, 37:335. March.
- . Italien im Driebund. *Die Zukunft*, 20:60. Jan.
- Triple Entente*. Les tentatives d'emprunt de l'Autriche-Hongrie en France et la Triple Entente. *André Cheredame*. *Q. dipl.*, 33:5. Jan.
- Tripoli*. Carlo Felice e il Bey di Tripoli (1825). *Giuseppe Gonni*. *Rassegna Naz.*, 183:457. Feb.
- . Case for Italy in the war over Tripoli. *R. of R.*, 45:97. Jan.
- . Encore la guerre! *Th. Ruyssen*. *La Paix par le Droit*, 15:74. Feb.
- . Die Fremdenrechte in der Türkei. *S. Unzer*. *Die Grenzboten*, 71:205. Jan.
- . "The Great Game" back of Italy and Turkey. *Wm. J. Ellis*. *Lippincott's*, 89:378. March.
- . La guerra. *Rassegna Naz.*, 183:326. Jan.
- . La guerra. *E. A. Toperti*. *Rassegna Naz.*, 183:620.
- . La guerra Italo-Turca. *Giovanni Goiran*. *Nuova Antol.*, 47:689. Feb.

- . La guerre italo-turque et ses conséquences. *L'Afrique française*, 22:27. Jan.
- . La guerre italo-turque. *Q. dipl.*, 33:59, 110, 179, 242. Jan.-Feb.
- . La guerre italo-turque. *Raymond Recouly*. *R. pol. et parl.*, 71:161. Jan.
- . [La guerre italo-turque.] *Mècheroutiette*. Jan.-Feb.-March.
- . Tripolitania e Cirenaica. *Attilio Bruniati*. *Rassegna Naz.*, 183:503. Feb.
- . Impressions sur la Tripolitane. *Comte Vay de Vaya et du Luskold*. *R. générale*, 48:185. Feb.
- . Italian manifesto against war. *R. of R.*, 45:98. Jan.
- . L'Italie et la guerre. *Edoardo Giretti*. *Le Mouvement Pacifiste*, 1:11. Jan.
- . Pace? Un Testimone. *Rassegna Naz.*, 183:475. Feb.
- . Un precursore degli Italiani a Tripoli. *Jack La Bolina*. *Rassegna Naz.*, 183:469. Feb.
- . Il proclama del generale Caneva alla popolazione araba. *Z. f. Völk. u. Bundes.*, 6:49.
- . Progress of the Italian war in Africa. *Cur. Lit.*, 52:29. Jan.
- . Una protesta inglese ed una risposta italiana a proposito della guerra. *La Vita Int.*, 15:36. Jan.
- . Real meaning of the Turco-Italian war. *R. of R.*, 45:223. Feb.
- . [Tripoli. The Italo-Turkey War.] *Concord*, 29:17. Feb.
- . Tripoli and Constantinople. *E. J. Dillon*. *Quarterly R.*, 216:248. Jan.
- . Turkey as victim and the taking of Tripoli, *Contemp. R.*, 100:862. Dec.
- . Turkey. *Mècheroutiette*. Dec., 1911. Jan., Feb.
- . Ueber die Gefahr des Italienisch-Türkischen Krieges für die Cholera-Verbreitung in Europa. *Deutsche R.*, 37:77. Jan.
- . Die Weltanschauung. *Adolf Harnacks, L. B.* *Deutsche Rundschau*, 38:25. Jan.
- . With the Italians in Tripoli. *T. Comyns Platt*. *National R.*, 59:118. March.
- Tunis*. L'emprunt tunisien. *L'Afrique française*, 22:26, 68. Jan.-Feb.
- Turkey*. The breakdown in Turkey. *E. J. Dillon*. *English R.*, 10:497.
- . Difficulties of the Young Turk party. *S. Cobb*. *N. Amer. R.*, 195:103. Jan.
- . La Turquie. *Louis Mèril*. *Nouvelle R.*, 26:69. March.
- . Turkey under the constitution. *Quarterly R.*, 216:202. Jan.
- United States of America*. Alte und neue Staatsauffassung in Amerika. *Paul S. Reinsch*. *Intern. Monatschrift*, 6:559. Feb.
- . American foreign policy. *Sydney Brooks*. *Liv. Age*, 271:603. Dec. 9.
- . American problems. *By An American Exile*. *Fort R.*, 91 (97):463. March.
- . American yellow press. *Sydney Brooks*. *Fort R.*, 90 (96):1126. Dec.
- . Dollar diplomacy. Uncle Sam, Wall Street and Co. open a Spanish American branch. *H. M. Hyde*. *Everybody's*, 26:77. Jan.
- . Les missionnaires belges et hollandais aux Etats-Unis d'Amérique, 1773-1850. *R. générale*, 48:51. Jan.

- . *La presse américaine*. *André Vernière*. *Q. dipl.*, 33:149. Feb.
- . Secret reports of John Howe, 1808. *Am. Hist. R.*, 17:70, 332. Oct.-Jan.
- United States of the World*. The United States of the World. *Forum*, 47:211. Feb.
- War*. De l'internement des prisonniers de guerre sur territoire neutre, en cas de guerre sur terre. *G. Sauser-Hall*. *R. gén. de dr. int. public*, 19:40. Jan.-Feb.
- . *Krieg und Mannheit*. *David Starr Jordan*. *Friedens-Warte*, 14:16, 57. Jan.-Feb.
- . *Kriegsfurcht*. *G. D. F. Emil v. Moinovich*. *Öster. Rundschau*, 30:243. Feb.
- . Newspaper correspondents in naval warfare. *A. Pearce Higgins*. *Z. f. Völk. und. Bundes.*, 6:19.
- Women*. Legal position of women in Norway. *J. Castberg*. 19th Cent., 71:364. Feb.
- . Changing ideals of the modern German woman. *R. of R.*, 45:231. Feb.
- . Preussen und die preussischen Frauen. *Bernarda von Rell*. *Preussische Jahrbücher*, 147:292. Feb.
- . Will women, when they have the vote, further the cause of peace? *Felix Moschelles*. *Concord*, 29:13. Feb.
- Woolsey, Theodore Dwight*. Theodore Dwight Woolsey. *By Theodore S. Woolsey*. *Yale R., n. s.*, 1:239

KATHRYN SELLERS.

ERRATA. January, 1912.

- Page 268, sixth line, fifth word, read 473; thirty-fourth line, third word, read politiques.
- Page 269, third line, ninth word, read 90.
- Page 270, fourth line, fourth word, read Aegypten; tenth line, omit; eleventh line, seventh word, read tures.
- Page 271, thirty-eighth line, eighth word, read 38; thirty-ninth line, third word, read maritimes.
- Page 272, first line, fifth word, read Naz.; second line, fourth word, read allemands; sixth line, first and second words, read Les accords; twenty-eighth line, seventh word, read Nuestro; forty-first line, ninth word, read 90.
- Page 273, sixth line, sixth word, omit; tenth line, first word, read 90; eleventh line, ninth word, read Friedens; nineteenth line, ninth word, read allgemeine; twenty-sixth line, first word, read Marokko.
- Page 275, first line, fourth word, read Interparlamentarier; fourth line, third word, read première, eleventh word, read comte; thirtieth line, first word, read Vertretungsbefugnis; thirty-ninth line, second word, read Le.
- Page 276, forty-second line, seventh word, read Tripolis.
- Page 277, seventeenth line, eighth word, read ottoman.

THE REAL SIGNIFICANCE OF THE DECLARATION OF LONDON *

The principal achievement of the Hague Conference of 1907 was the Convention for an International Prize Court. That convention provided for a real and permanent court composed of judges who were to be appointed by the contracting Powers for terms of six years, were required to be "judges of known proficiency in questions of international maritime law and of the highest moral reputation," and were to be paid a stated compensation from a fund contributed by all the Powers.

Jurisdiction was conferred upon the court to review on appeal all judgments of national prize courts. By a subsequent agreement, for the purpose of avoiding difficulties presented by the constitutions of some of the signatory Powers, an alternative procedure was authorized under which the new court might pass upon the question involved in the case of prize *de novo*, and notwithstanding any judgment of the national prize court, instead of passing upon it by way of appeal from that judgment. Article 7 of the convention provides:

If a question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the court is governed by the provisions of the said treaty.

In the absence of such provisions the court shall apply the rule of international law. If no generally recognized rule exists the court shall give judgment in accordance with the general principles of justice and equity.

In estimating the value of such an agreement among the civilized Powers it is worth while even for a student of international law to recall the wide range and critical importance of the questions to be included within the jurisdiction of the new court.

* Opening address by Elihu Root as President of The American Society of International Law at the Sixth Annual Meeting of the Society in Washington, April 25, 1912.

When war breaks out between two considerable maritime Powers the commerce of the whole world is immediately affected. Each belligerent nation undertakes, so far as it can, to cripple its enemy both by direct military and naval operations and by cutting off supplies, interfering with sources of income, and generally weakening the enemy's national power to maintain an army and navy.

The liability of enemy merchant ships to capture tends to throw the commerce formerly carried on by the belligerent nations into the hands of neutrals while the necessary policy of each belligerent urges it to circumscribe and prevent so far as it can the neutral commerce with the other belligerent. Blockades and searches and seizures for carrying contraband goods are familiar methods of giving effect to this policy. Added to this is the necessity of constant watchfulness by belligerents to prevent neutral vessels from rendering direct service to the enemy's forces, such as the transportation of officers and troops or messengers, or the transmission of intelligence. In this way belligerents fall into an attitude of suspicion toward neutral vessels and unfriendliness toward neutral commerce, and the peaceable commerce of the world falls into an attitude of resenting what it regards as unwarranted interference.

The most striking illustration of this tendency is to be found in the tremendous conflicts of the Napoleonic wars, when Pitt and Napoleon waged war not merely with armies and navies but with British orders in council and Continental decrees. The Prussian Decree which began the series at the instance of Napoleon, on the 28th of March, 1806, declared the coast of the North Sea closed against Great Britain. On the 8th of April, 1806, Great Britain retaliated for that decree by the first order in council, which declared the blockade of the Ems, the Weser, the Elbe, and the Trave. On the 16th of May, 1806, came the second order in council declaring a blockade of the whole coast of the Continent from the Elbe to Brest. On the 14th of October, 1806, Napoleon retaliated with the famous Berlin Decree, which prohibited all commerce with England. On the 7th of January, 1807, another British order in council declared all neutral trading with France, or from port to port with any possession of France, or with any of the allies of France anywhere, to be ground for condemnation. On the 17th of December,

1807, Napoleon's Milan Decree declared a sentence of outlawry upon England and all English ships. It was impossible that such a process should not involve all Europe in a universal war; and an aftermath of England's enforcement of her policy upon the neutral shipping of the United States was the War of 1812.

The Civil War in the United States gave rise to a multitude of controversies between the United States and Great Britain, arising on one side from the seizure by the United States of numerous vessels charged with directly or indirectly attempting to violate the blockade of the southern coast, or with carrying contraband, and arising on the other side from the fitting out of Confederate cruisers in the neutral ports of Great Britain. The negotiations which led to the settlement of both classes of these claims by arbitration under the Treaty of Washington involved no slight strain upon the temper and good sense of both nations, and the result was reached against most violent protest on the part of many who preferred war to concession.

In the recent war between Russia and Japan a feeling of strong resentment was created in England by Russia's course in sinking the British merchantmen, the *Knight Commander*, the *Saint Kilda*, the *Hipsang*, and the *Allenton*, and in the capture of the *Malacca* by Russian vessels which had passed the Dardanelles and the Suez Canal as merchantmen and then converted themselves into cruisers.

There is no more fruitful source of international controversy, of international resentment and dislike, than in the great multitude of questions relating to the rights and wrongs of neutrals and of belligerents in a war between maritime Powers. The tendency always is for the war to spread through these controversies and exasperated feelings, and the adjudication of questions by national prize courts naturally fails to allay the irritation. Provision for the international judicial determination of such questions is adapted not only to preserve the substantial rights of neutral commerce and of belligerents, but also to prevent the spread of war much as municipal ordinances are framed to check the spread of fire, and sanitary regulations to prevent the communication of infectious disease. Considered by itself, the concurrence of the major part of the civilized world in the project of this convention

was an event of the first importance in the development of international peace.

When Great Britain, however, came to consider the ratification of the Prize Court Convention she found herself confronted by practical considerations arising from her insular position, her dependence upon foreign food supplies, the wide extension of her colonial empire, her enormous merchant marine, and the relation between the effectiveness of her great navy and her national existence. The effect of these considerations upon the Government of Great Britain is best stated in the words of a communication which that government addressed on the 27th of February, 1908, to the other principal maritime Powers. In that communication Sir Edward Grey said:

Article 7 of the convention provides that, in the absence of treaty stipulations applicable to the case, the court is to decide the appeals that come before it, in accordance with the rules of international law, or if no generally recognized rules exist, in accordance with the general principles of justice and equity.

The discussions which took place at The Hague during the recent conference showed that on various questions connected with maritime war divergent views and practices prevailed among the nations of the world. Upon some of these subjects an agreement was reached, but on others it was not found possible within the period for which the conference assembled, to arrive at an understanding. The impression was gained that the establishment of the International Prize Court would not meet with general acceptance so long as vagueness and uncertainty exist as to the principles which the court, in dealing with appeals brought before it, would apply to questions of far-reaching importance affecting naval policy and practice.

His Majesty's Government therefore propose that another conference should assemble during the autumn of the present year, with the object of arriving at an agreement as to what are the generally recognized principles of international law, within the meaning of paragraph 2 of Article 7 of the convention, as to those matters wherein the practice of nations has varied, and of then formulating the rules which, in the absence of special treaty provisions applicable to a particular case, the court should observe in dealing with appeals brought before it for decision.

That is to say, the realization of the International Prize Court must be postponed until an agreement can be reached upon the rules of law and the principles of justice and equity which the court is to apply to international controversies. No dissent from this view appears to

have been expressed and, pursuant to the British invitation, Austria-Hungary, France, Germany, Italy, Japan, Russia, Spain, The Netherlands, and the United States, sent their delegates to the proposed conference in London. The conference met on the 4th of December, 1908, and continued to the 26th of February, 1909.

The task of the conference was delicate and difficult. The Declaration of Paris in 1856 had, it is true, furnished four rules as a point of departure:

- (1) Privateering is and remains abolished.
- (2) The neutral flag covers enemy's merchandise with the exception of contraband of war.
- (3) Neutral merchandise, with the exception of contraband of war, is not capturable under the enemy's flag.
- (4) Blockades, in order to be obligatory, must be effective; that is to say, maintained by a force sufficient to really prevent access to the coast of the enemy.

But the half century which had elapsed since the Declaration of Paris had shown that these rules left uncovered a great field of controversy and that they had themselves given rise to numerous questions for which they afforded no solution. The divergent views upon these subjects of controversy had become entrenched in many traditional ideas of different nations as to the requirements of their national interests either as possible belligerents or possible neutrals, and these ideas made concessions difficult, so difficult that at the Second Hague Conference it had been found quite impracticable to reach any conclusions upon questions of this character having real importance.

The members of the London Conference addressed themselves to their work with ability, knowledge, and good temper, and they agreed upon a code of rules which they called a "Declaration Concerning the Laws of Naval War," and which is known as the Declaration of London. The first chapter of the declaration, containing 21 articles, deals with the law of blockade in time of war. The second chapter covers the law of contraband, in 23 articles. The third chapter contains 3 articles upon the law of unneutral service. The fourth chapter, 7 articles, on the destruction of neutral prizes. The fifth chapter, 2 articles, on transfer of flag. The sixth chapter, 4 articles, on enemy

character. The seventh chapter, 2 articles regarding convoy. The eighth chapter, 1 article concerning resistance to search. The ninth chapter, an article upon compensation. Then follow 7 final articles. The preamble of the declaration declares the Powers (naming them) —

Considering the invitation which the British Government has given to various Powers to meet in conference in order to determine together as to what are the generally recognized rules of international law within the meaning of Article 7 of the Convention of 18th October, 1907, relative to the establishment of an International Prize Court;

Recognizing all the advantages which in the unfortunate event of a naval war an agreement as to the said rules would present, both as regards peaceful commerce, and as regards the belligerents and as regards their political relations with neutral governments;

Considering that the general principles of international law are often in their practical application the subject of divergent procedure;

Animated by the desire to insure henceforward a greater uniformity in this respect;

Hoping that a work so important to the common welfare will meet with general approval:

Have appointed as their plenipotentiaries, that is to say: [Names of Plenipotentiaries.]

Who, after having communicated their full powers, found in good and due form, have agreed to make the present declaration: —

Preliminary Provision

The signatory Powers are agreed in declaring that the rules contained in the following chapters correspond in substance with the generally recognized principles of international law.

It is interesting to observe that in the rules regarding contraband, the doctrine of continuous voyages, with which the Americans were so much concerned during the Civil War, is applied to absolute contraband but not to conditional contraband; that the great extension of the list of contraband articles, which, in the war between Russia and Japan, caused such general dissatisfaction among neutrals and threatened to nullify the doctrine that free ships make free goods, has been checked by a definite list of articles which are not under any circumstances to be considered contraband, and by carefully framed provisions requiring affirmative proof that goods are destined for the use of the armed forces or a government department of the enemy as a condition upon the right to seize conditional contraband. It is also interesting

that the question so much discussed at the time of the *Trent* affair between England and the United States has been disposed of by the provision of Article 47 that "any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel may be made a prisoner of war even though there may be no ground for the capture of the vessel."

This by implication excludes civil agents such as Mason and Slidell from capture but approves the method followed by Captain Wilkes in taking persons assumed to be liable to capture from the vessel and releasing the vessel.

It is not, however, my purpose to discuss the specific provisions of these rules.

The declaration was accompanied by a very lucid and illuminating report prepared by M. Renault, which was presented to the conference upon behalf of the drafting committee and which, under Continental usage, is to be treated as an authoritative explanation of the text. The report says of the declaration:

The body of rules contained in the declaration, which is the result of the deliberations of the Naval Conference, and which is to be entitled Declaration Concerning the Laws of Naval War, answers well to the desire expressed by the British Government in its invitation of February, 1908. The questions of the program are all settled except two, concerning which explanations will be given later. The solutions have been deduced from the various views or different practices and correspond to what may be called the *media sententia*. They do not always harmonize absolutely with the views peculiar to each country, but they do not shock the essential ideas of any. They should not be examined separately, but as a whole, otherwise one runs the risk of the most serious misunderstandings. In fact, if one considers one or more isolated rules either from the belligerent or the neutral point of view, he may find the interests with which he is especially concerned have been disregarded by the adoption of these rules, but the rules have their other side. The work is one of compromise and of mutual concession. It is, as a whole, a good work.

We confidently hope that those who study it seriously will answer affirmatively. The declaration substitutes uniformity and certainty for the diversity and the obscurity from which international relations have too long suffered. The conference has tried to reconcile in an equitable and practical way the rights of belligerents and those of neutral commerce; it is made up of Powers placed in very unlike conditions, from the political, economic, and geographical points of view. There is

on this account reason to suppose that the rules on which these Powers are in accord take sufficient account of the different interests involved, and hence may be accepted without disadvantage by all the others.

Two questions proposed by Great Britain to the conference remain unanswered: One, relating to the transformation of merchant vessels into warships on the high seas, and the other, the question whether the nationality or the domicile of the owner should be adopted in determining whether property is enemy property. Upon these questions the divergence of views remains unsettled. But throughout the great field of controversy in this branch of international law all existing differences have been settled by fair agreement upon just and reasonable rules.

Professor Westlake said, in the *Nineteenth Century*, for March, 1910:

That the ten greatest naval Powers of the world should have met in conference on the laws of naval war as affecting neutrals, and that after careful consideration they should have agreed upon a code so comprehensive as that contained in the Declaration of London, would alone suffice to make the year nineteen hundred and nine memorable to all who are interested in the improvement of international relations. It remains for the year nineteen hundred and ten to make that code binding on the parties by ratification, after which the natural course of events will speedily make it the binding code of the world.

It appeared to many of us, indeed, when the agreement was reached and the conference dissolved, that a great thing had been done and that the way had been cleared to carry into effect the Prize Court Convention and to establish upon a permanent basis the judicial settlement of this class of international controversies through the application of an accepted code of law.

Unfortunately, that belief has not been justified. An excited controversy immediately arose regarding the effect of the rules contained in the Declaration of London upon the interests of Great Britain. One set of objectors declared that the rules sacrificed the interests of Great Britain as a belligerent. Another set asserted that the rules destroyed the interests of Great Britain as a neutral. Both could not be true, yet each set of objectors continued strenuously to oppose the declaration upon its own grounds.

An examination of the arguments on both sides in Great Britain

leads to the conclusion that Mr. Norman Bentwich sums up the controversy fairly when he says, in the *Fortnightly Review*:

Great Britain should now be in a position to ratify the Hague Prize Court Convention, when at least she has made the necessary changes in her national prize law. She has come out very well indeed from the international bargaining: she had most to lose by the previous uncertainty; she has gained most by the settlement. At Paris, in 1856, she gave up one of her most powerful belligerent rights—the right to capture enemy property in neutral ships. Now in London she has not given up a single established belligerent right of value, her sole concession being on the question of convoy which is more apparent than real; and, on the other hand, she has gained a number of safeguards for her neutral commerce, and a number of limitations of the alleged belligerent rights of other Powers. There is indeed a naval school which is bitterly hostile to the ratification of the declaration, on the ground that by it England gives up certain national claims of long standing and concedes certain rights against which she has long struggled. But the claims we give up have not been effectively exercised by us, the rights we concede have regularly been practiced against us.

Nevertheless the Prize Court Bill, introduced in Parliament to give effect to the convention and the declaration, passed the House of Commons but was rejected by the House of Lords, and so the matter stands.

This is unfortunate not merely because the rules of law contained in the declaration are wise and just and would be beneficial to the world, but because the most promising forward movement toward the peaceable settlement of international disputes is frustrated by the kind of treatment which, if persisted in, must apparently prevent all forward movement in the same line. The Prize Court Convention is representative of the general movement for judicial settlement. The Declaration of London is representative of the agreement upon the rules of international law which is essential to the establishment of the practice of judicial settlement in all other branches of international controversy.

For some time past there has been a growing impression among men familiar with international affairs that the obstacles to the development of any real system for the submission of international disputes to impartial decision are to be found not so much in the unwillingness of nations to submit their disputes to such a decision, but in the lack of adequate machinery through which such decisions may be secured. The tendency of arbitrations in which representatives of the disputing

countries are joined with eminent publicists from other countries for the determination of international controversies is not to decide questions of fact and law, but it is to negotiate a settlement. Arbitrators as a rule act as diplomatists under the diplomatic sense of honorable obligation rather than as judges under the judicial sense of honorable obligation. Their tendency is to do what they think is wise and for the best interests of all concerned and to get the controversy disposed of in some way without too much ill feeling upon either side. In this process the frequent failure of international law to furnish any certain or undisputed guide for action affords free opportunity for the personal predilections of the arbitrator, often colored or determined by the prevailing opinions in the country from which he comes; and these opinions are often quite unlike those which prevail among the people of either of the disputing countries. It often happens, therefore, that the selection of the arbitrators is the most critical and decisive step in the arbitration. It is very difficult to apply to such a proceeding the analogy of a judicial proceeding under municipal law for the trial and decision of cases between private litigants. It may well be that countries are unwilling to have their interests disposed of in that way, although they would be perfectly ready to submit their cases to the decision of judges acting under the judicial sense of responsibility. Many of us are convinced that the true line of development for the peaceable settlement of international controversies is to be found in the establishment of a real international court which shall hear and determine questions instead of negotiating a settlement of them. This question was much discussed in the Hague Conference of 1907, which approved and recommended to the Powers the adoption of a draft convention for the creation of a Judicial Arbitral Court to be composed of judges appointed for fixed periods with stated compensation and chosen from persons "fulfilling the conditions qualifying them in their respective countries to occupy high legal posts, or to be jurists of recognized competence in matters of international law." The procedure, powers, and jurisdiction of the court were all provided for and the draft convention as approved by the conference was defective only in not determining how the judges should be appointed. The determination upon this matter was prevented by difference of opinion between the larger and the smaller Powers repre-

sented in the conference. The provision for a general judicial court with jurisdiction to hear and determine all matters of international dispute was thus carried within one step of the completeness which was reached in the convention for the International Prize Court. The Prize Court thus became the advance guard of the proposed judicial system, the experiment upon which the success of the whole plainly depends. President Roosevelt, in his message to Congress of December 3, 1907, said truly:

Not only will the International Prize Court be the means of protecting the interest of neutrals, but it is in itself a step toward the creation of the most general court for the hearing of international controversies, to which reference has just been made. The organization and action of such a Prize Court cannot fail to accustom the different countries to the submission of international questions to the decision of an international tribunal, and we may confidently expect the results of such submission to bring about a general agreement upon the enlargement of the practice.

The relations between the project for the Prize Court and the project for the general Judicial Arbitral Court are so manifest that the United States has already proposed to the other Powers an enlargement of the jurisdiction of the Prize Court so that any question between the signatory Powers can be heard and determined by the judges of the Prize Court. This was done by instructions to the delegates of the United States at the London Conference, dated February 6, 1909, by an identic circular note to the Powers represented at that conference dated March 5, 1909, and by a formal communication from the Department of State to the Powers, dated October 18, 1909. The form given to the proposal in the last mentioned communication from the American State Department was that there should be —

a further agreement that the International Court of Prize established by the Convention signed at The Hague, October 18, 1907, and the judges thereof shall be competent to entertain and decide any case of arbitration presented to it by a signatory of the International Court of Prize, and that when sitting as a Court of Arbitral Justice the said International Court of Prize shall conduct its proceedings in accordance with the draft convention for the establishment of a Court of Arbitral Justice, approved and recommended by the Second Hague Peace Conference, on October 18, 1907.

I am advised that this proposal was favorably received and that action to give it effect in some practicable form only awaits the ratification of the Prize Court Convention. This line of advance also is thus blocked by the failure to confirm the Declaration of London.

This review of the origin and nature of the Declaration of London and of the attendant conditions exhibits the true significance of the declaration. It is not merely a code of useful rules. It is necessary to the existence of the International Prize Court and therefore to the existence of any Judicial Arbitral Court. It is the one indispensable forward step without which no practical progress can now be made in the further development of a system of peaceable settlement of international disputes. It is to be hoped that a fuller realization of its far-reaching importance will soon lead to its acceptance. I cannot avoid the conviction that a broad-minded and statesmanlike treatment of this constructive measure for practical progress in international relations, is of greater value than merely benevolent but academic declarations in favor of peace which are to be found in general treaties of arbitration and in diplomatic correspondence and in public speeches.

Indeed the whole practice of making general treaties of arbitration cannot fail to be discredited by the failure, if there is to be a failure, of the Prize Court Convention, for the cynical are sure to question the sincerity of general treaties of arbitration covering the whole field of international relations between nations which refuse to assent to this convention covering but a small part of the same field.

ELIHU ROOT.

GENERAL ARBITRATION TREATIES *

It is undoubtedly desirable, in the interest of the arbitration of international controversies, that at the next Hague Conference a form of treaty should be presented which, while covering all differences between states, shall steer clear of the difficulties which in the past have wrecked important treaties of that character. It is a matter in which the United States may be expected to lead, having by precept and example so often distinguished itself as a pioneer in movements tending to do away with war between nations. Facts must be looked in the face, however, and it is apparent that the present position of the United States with reference to this subject is not so advantageous as could be wished. No two countries of the world are so favorably situated for the purposes of an arbitration treaty between them inclusive of all differences as are Great Britain and the United States. Through racial, social, and commercial ties ever knitting them closely together, war between them has become almost unthinkable. Yet two trials for such a comprehensive treaty have failed and the official position of the United States to-day seems to be that there is a class of questions which is necessarily to be excluded from any general arbitration treaty. The class covers controversies described as affecting "the vital interests, the independence, or the honor" of the parties. In the English-American treaty of 1897 such controversies were disposed of by sending them to arbitration but so constituting the arbitral court that an award must have the assent of the representatives of the losing party or of a majority of them. In the treaty of 1911 it was sought to meet the difficulty by a joint commission of inquiry empowered to investigate and decide whether a question was or was not arbitrable and should or should not be arbitrated. But neither plan proved to be acceptable to the United States acting under the treaty-making power vested jointly in the President and Senate.

* Address delivered before the American Society of International Law at its Sixth Annual Meeting, Washington, D. C., April 26, 1912.

Notwithstanding past failures, it is not believed that the United States should be deemed to be irrevocably committed to the position that it will make no general arbitration treaty which does not exclude from its operation what are claimed to be non-arbitrable questions as above defined. Neither is there any controlling reason why its representatives at the next Hague Conference may not propose a draft of treaty between nations which shall be so framed as to minimize if not remove the objections to making all controversies at least *prima facie* arbitrable. Such a draft would, of course, be without the official endorsement of the United States Government. But it could be assumed to have the sympathetic endorsement of the American people, who are believed to have strongly favored the efforts of three Presidents to make an English-American treaty from which no subject of difference should be excepted. A draft treaty of that character presented by our representatives at The Hague would be received not only with respect but with great interest; would be discussed in all its aspects with earnestness and ability; and, if generally approved, could be urged upon the United States Government as something to be adopted and used in a renewed effort to substitute arbitration for war as the means of settling international disputes.

In considering the feasibility of such a draft treaty, it may not be wholly superfluous to note that matters of national policy, domestic or foreign, are universally conceded to be outside the category of arbitrable questions. Thus, the right of every independent state to determine for itself what persons and what property shall have access to its territory, or with what other state or states it will form amicable relations for mutual advantage, can not be drawn in question by any other state. It is to be assumed also for present purposes that the discussion deals not with weak states which cannot defend themselves against aggression either directly, or indirectly through alliances, but with states entirely competent to protect themselves from spoliation or outrage. No such state, it is claimed, should or will litigate its honor, its independence, or its vital interests. If that be admitted, two difficulties in connection with the making of a comprehensive arbitration treaty at once present themselves. One is that what differences will touch honor, independence, and vital interests can not possibly be defined in advance, and that, even after a difference has actually arisen,

its nature as being of the arbitrable or non-arbitrable class can hardly fail to be matter of real doubt and debate. The other difficulty is that, whether an actual difference touches its honor, independence, or vital interests every nation, it is urged, must decide for itself and can not consent to have determined in any other way. The practical problem, therefore, is how to lessen the force of these obstacles and upon what lines an arbitration treaty between nations may be so constructed as, while recognizing the obstacles and not denying them any legitimate operation, shall yet be the nearest possible approach to a treaty covering all differences.

It will conduce to that result, it is believed, if such a treaty shall expressly declare that all differences between the contracting parties of whatever character, unless adjusted by diplomacy, shall be settled by arbitration, and that whenever a difference not so adjustable presents itself, the parties shall immediately proceed to set in motion the designated machinery by which the arbitration is to be made effective. The mere existence of such a treaty will have a desirable moral effect upon the governments and peoples of both the parties. It will accustom them to consider arbitration as the normal mode of settling their difficulties and to look upon any other mode as unusual and extraordinary and as justifiable only by some great and exceptional emergency.

It will also conduce to the same result, by removing the objections already stated, if such a treaty, after making all differences arbitrable, shall then reserve to the legislature of either of the contracting parties the right and the opportunity to withdraw a particular subject-matter from arbitration by a declaration that it concerns its honor, independence or vital interests. In this connection, the modern organization of the governments of the great states of the world is to be noted. On the one hand, the principle of democracy is so far accepted and so far controls that the legislative power is exercised by representatives chosen, theoretically even if imperfectly in practice, by the free suffrages of the people. On the one hand, the treaty-making power, together with the measures and proceedings incident to its execution, is practically vested in the executive branch of the government. It is that branch which, under a treaty excluding the supposed non-arbitrable class of questions, would decide whether a difference was within that class, and, if deciding

that it was, would block arbitration. Under the all-inclusive form of treaty now proposed, however, arbitration will go forward in the regular prescribed course unless arrested by the action of the legislative branch of one of the governments concerned. It is that branch which will decide against arbitration if it is prevented, and which will assume the responsibility of such decision, as it properly should for obvious reasons.

The national legislature is the best representative of the people of a country and is the most closely in touch with the sentiments, views, and interests of its people.

The direct representatives of the people should take the responsibility of a decision which may lead to war because it is by the people that the losses and sufferings of war are to be borne.

The executive administration of a nation as the agent of its dominant party may easily be influenced by motives of a secret and personal nature; may conceive party success to be identical with national honor, independence, or vital interests; and is only too likely to proceed without that thorough enlightenment which is only possible when the discussion of a measure is by party opponents as well as by party friends.

When the national legislature, on the other hand, is confronted with the alternative of risking or making war, or of permitting arbitration of a difference with another nation to take its appointed course, there will necessarily ensue such investigation, discussion and deliberation as will bring out the merits of the dispute in all its aspects and will enable the dictates of genuine patriotism and sound policy to exert their legitimate influence.

In short, to refer the decision of such an issue to a national legislature ensures bringing into play two forces of prime importance in the interest of peace — to wit, full publicity of all material facts and considerations, and sufficient time for reason to become the deciding factor in the result.

By reason of the solidarity of modern civilized states, public opinion as manifested not only in those directly concerned but in all is sure to act with enormous force whenever war between any of them is seriously threatened.

When Earl Russell, speaking for the government of the day, characterized the American proposition to arbitrate the so-called "Alabama

claims" as inconsistent with the honor and dignity of the British throne and people, the door seemed to be finally closed upon any pacific settlement. It was reopened later by the pressure of public opinion, which had been given time to crystallize, which discovered that there was a real wrong to be redressed, and which led the British Government to seek and find a way to arbitrate the claims without prejudice to honor or substantial interests.

A similar case was presented and a similar result followed in respect of the boundary controversy between Venezuela and British Guiana, which was at first claimed to be impossible of arbitration by reason of the rights and equities of British settlers.

These instances are striking examples of time and publicity and an ensuing educated public opinion as potent preventives of war. It is a conspicuous merit of such an all-inclusive arbitration treaty as that under consideration that, while in and of itself a constant influence for peace, legislative interference with it can not take place without giving such preventives their fullest operation.

It remains to note that it is possible for the legislative branch of a government as well as the executive to go astray and to be misled into declaring an arbitrable difference to involve honor, independence, or vital interests. But such a declaration is not a finality and may be revoked by legislators of their own motion or through the influence of their constituencies. Further, if such a declaration brings war in sight, it also compels investigating the preparedness for war, comparing the warlike resources of the parties, and counting the cost generally — considerations of a most sobering as well as persuasive character. Here again the solidarity of modern states operates as a strong conservator of peace. The length of the purse rather than of the sword now determines the fortunes of war, and the most bellicose of great Powers can not but be staggered by the prospect of disrupting the closely interlocked relations, pecuniary and commercial, between its own country and the country to be assailed. In no quarter will the widespread ruin of such a disruption be more keenly appreciated than by the legislature of a country, intimately and practically acquainted as it must be with its industries and business interests — in no quarter is there likely to be more zealous effort to preserve "peace with honor."

Nevertheless, when all is said, until the millennium arrives, the possibility of war is not to be wholly eliminated. Treaties of arbitration and all the other pacific instrumentalities the wit of man can devise can do no more than to make the possibility as remote as is humanly practicable.

RICHARD OLNEY.

THE ANGLO-GERMAN TENSION AND A SOLUTION

An English writer¹ in the *Nineteenth Century and After*, for April last, after naming twelve wars since 1850, great in political effect and, with two exceptions, great also in bloodshed, says:

If all these wars, and others which I have not stopped to name, were insufficient to convince our Radicals that their whole theory of international affairs was false, then the events that next followed might at last have brought the proof. In the South African war Britain had over two hundred and fifty thousand troops in the field, while the British Navy alone stood between our otherwise unguarded shores and a Europe burning to intervene — a feat which, in like circumstances, it is now no longer adequate to perform. Meantime, in a silence inspired with a terrible energy, had proceeded the renaissance of the Japanese — a renaissance not of letters, but of arms, until, in 1904-5, by sea and by land she showed to mankind a new portent, the victory of an Asiatic race over one of the mightiest empires of the West. Later still than all this, even within the last few months, a vast upheaval, fraught with infinite meaning for the whole world, has occurred in China; while even at the present time a war is proceeding between Italy and Turkey, and rumours of possible co-operation with the former Power on the part of Russia are rife in the world.

As if all this were not enough evidence of the impermanence of all political conditions, Western mankind is also threatened with an earthquake from beneath in comparison with which the fury of the French Revolution itself might pale its ineffectual fires. The "Red Peril" already throws its lurid glare across the page of coming history, and intestine struggles on a scale unprecedented in human annals are already looming on the horizon of nearly all civilized peoples.

Yet in face of these tremendous and appalling probabilities of the near future, in sight of the storm-signs of an era of almost universal war, there are yet to be found, mainly in the realms of the English-speaking race, great numbers of politicians, of speakers, and of writers who either believe or pretend to believe that war is an anachronism for which arbitration can be substituted. With this belief every act of our Liberal Government has been coloured from the date of its assumption of office in 1906 until the present day. They can see the boundaries of nations but as fixed quantities, although in fact the territories of every Great

¹ H. F. Wyatt.

Power have been in a state of flux for sixty years, and are in a state of flux now. With a fatuity probably unparalleled in the records of the past, they continue to appeal to Germany to curb the pace of her naval construction, without reflecting that this request amounts to an adjuration to our greatest rival to abandon her national ambition and to cease her national growth. The truth is that for a growing people armaments are the instruments by which expansion is achieved. Only for a people which has ceased to grow are they weapons merely of defence.

Again, our English Radicals prate constantly of "rights." When they use that term in relation to a nation they are the slaves of a sound, and of a gross confusion of ideas. What is a "right" on the part of a people? An independent State has no "right" as against other States, save that of the sword alone. The right of the individual exists only so long as the Government of the country of which he is the son guarantees that right with the armed force of that country. With the withdrawal of that guarantee passes also that right.

These views, quoted somewhat at length, present undoubtedly the views of a large school of thoughtful men. In any case it would seem that while discussing means of keeping the peace, which every thoughtful man desires, an indispensable preliminary is to know as clearly as possible the conditions we now face. We want the basic facts of the problem which, as I see it, has not for many years presented a more serious aspect. I have thus tried to present a short study of the more important elements of the situation of the moment, along with the facts which have led to this situation. The whole are matters of history and thus open for our discussion and comment. I begin with the comment of a distinguished English publicist. Mr. Sidney Low in an article, "The Most Christian Powers," in the British *Fortnightly Review* for March, says:

Lord William Cecil and various other earnest persons have been suggesting that the present would be a favorable season to impress upon the inhabitants of China and indeed of Asia in general, the advantage of subscribing to the tenets of the Christian religion. Since a disciple of Buddha or Confucius, or Mohammed can hardly be expected to accept Christianity as the result of a divine revelation, it must be presumed that he is to be converted by being convinced of the superior morality of the religion which is professed and, to some small extent, practiced by the peoples of Western Europe. He is to become a Christian by learning . . . that the Christian nations are imbued by a more austere morality, a deeper sense of law, a larger idea of justice and

mercy, and a greater reluctance to employ force in order to overpower the weak, and oppress the helpless.

After expanding this thought a bit, he proceeds to say how far otherwise has been the reality. He says:

The conduct of the Most Christian powers during the past few years has borne a striking resemblance to that of robber-bands descending upon an unarmed and helpless population of peasants. So far from respecting the rights of other nations, they have exhibited the most complete and cynical disregard for them. They have in fact, asserted the claim of the strong to prey upon the weak, and the utter impotence of all ethical considerations in the face of armed force, with a crude nakedness which few eastern military conquerors could well have surpassed.

It would be difficult to present a more severe indictment. It comes from a close student of international affairs and one of international reputation. Being himself English, his remarks must be taken as representing one phase at least of British opinion regarding his country's diplomacy of late years.

The vista of world conditions to-day is certainly much like an outlook over an angry sea under a gathering tempest. Four hundred millions of Chinese are in the throes of social reconstruction, Mongolia and Manchuria are practically torn from the control of the ancient empire to which they have so long been attached, Chinese suzerainty is practically ignored by the two great military Powers which were so lately fighting their battles in Manchurian territory, but which have now amicably come together to determine between them Manchuria's new status. In India, a large portion of her 300,000,000 are clamoring for Indian rule as against what has been the really beneficent administration of the British. Going westward, into the Mediterranean, we have Egypt under foreign control, North Africa partitioned off and in European hands and the whole of Africa, most of which was but a few years since a *terra incognita*, now divided between Great Britain, France, Germany, Belgium, Italy and Portugal, a division made by right of might, much as we possessed ourselves of the lands of the North American Indian.

Nor is our own continent free of difficulties. Our neighbor Mexico has been and is in the midst of revolutionary disturbances and we are

anxiously watching developments, hoping almost against hope that nothing will happen to cause an armed intervention.

Only last summer Great Britain was on the very brink of action which would have thrown practically the whole of Europe into the vortex of war, from the Atlantic Ocean to the Black Sea. And for what? The story is a startling and impressive one and shows how weak still is the leash which holds the dogs of war. How did such a situation arise?

To find the reason we must go back eight years, when in 1904 there was made public an agreement which had been secretly reached between England and France, by which in return for the withdrawal by France from her right to exercise partial control over Egyptian finances and from her long troublesome fish-drying rights on the Newfoundland shore, and some minor yieldings, England, so far as she was concerned, gave France practically a free foot in Morocco. Says Mr. E. D. Morel, a high authority in African affairs,² in the *Nineteenth Century and After*, for February last: "It was to *Le Matin* [of Paris] that the British people were indebted for their knowledge that France had, seven years ago, with the concurrence of the [British] Foreign Office, arranged for a partition of Morocco with Spain at the very time that M. Delcassé was solemnly assuring Europe and the Sultan [of Morocco] of French disinterestedness." I. e., these three countries, England, France and Spain, made a trade in which an independent country, larger than France, with perhaps 10,000,000 of population, was the subject of the barter. It was the Pandora's box which contained all the woes of which the present European situation is the result. So clear did this appear to me at the time that I wrote early in 1905 to a prominent English friend that this must be the effect.

Germany, which had been ignored, was incensed. The Emperor visited Tangier and said things which resulted in the Algeciras Conference. The declarations of this conference, signed April 7, 1906, began with a statement from the several Powers concerned that:

Inspired with the interest attaching itself to the reign of order, peace and prosperity in Morocco, and recognizing that the attainment thereof can only be effected by means of the introduction of reforms based upon

² For a detailed study of the Morocco question, see E. D. Morel, *Morocco in Diplomacy*, Smith Elder & Co., just published.

the triple principle of the sovereignty of His Majesty the Sultan, the integrity of his domains, and economic liberty without any inequality, [they] have resolved, upon the invitation of His Shereefian Majesty, to call together a conference at Algeciras for the purpose of arriving at an understanding upon the said reforms, as well as examining the means for obtaining the resources³ necessary for their application.

In accordance with the foregoing the conference adopted:

- I. A declaration relative to the organization of the police.
- II. A regulation concerning the contraband of arms.
- III. A concession for a Moroccan state bank.
- IV. A declaration concerning taxes and new revenues.
- V. A regulation concerning the customs of the empire and the repression of fraud and smuggling.
- VI. A declaration relative to public services and public works.

The police ("not more than 2,500 or less than 2,000") were to be recruited from Moorish Mohammedans and were to "be under the sovereign authority" of the Sultan. Between 16 and 20 Spanish and French officers and between 30 and 40 non-commissioned officers as instructors were to be placed at the disposal of the Sultan, their designation to be first approved by him. They were to have double their usual pay, living expenses, horses, and fodder for the horses. The position of these officers was to extend to the Moorish authorities their technical aid in the exercise of command. They did not command. There was also to be a Swiss inspector-general, with residence at Tangier.

The declarations of main importance were those concerning public services and public works. The jealousy of the Powers had been the main cause of Moorish backwardness in the improvement of ports and roads. The convention declared that the signatory Powers reserved "to themselves the right to see to it that the authority of the state over these great enterprises of general interest remains entire"; that the validity of the concessions "shall throughout the Shereefian Empire be subordinated to the principle of public awards on proposals, without preference to nationality, whenever applicable under the rules followed in foreign laws." The diplomatic body in Morocco was to be informed of proposals for new works "to enable the nationals of all the signatory Powers to form a clear idea of the contemplated works and compete

³ *The American Journal of International Law*, Supplement, Vol. I (1907), 47 et seq.

for the same." There was to be absolutely free competition and no advantage given to competitors of one nationality over those of another.

It is needless to pursue this part of the subject. It is clear that the nationality of Morocco was to be intact and that all the Powers were to be on an equal footing as to exploitation.

Nothing apparently could be fairer or more satisfactory. What followed? The next act was the bombardment on 30 July 1907 by a French man of war of Casablanca on the west coast of Morocco because of a slight difficulty which was caused, it is understood, by acts in a cemetery, which the Moors resented. Houses were knocked down, a number of inhabitants killed, and a force landed. This was followed in 1911 by a French expedition of 16,000 men to Fez on the pretext that the lives of foreigners in Fez were in danger. The expedition, after a futile resistance by the Moors, arrived to find the foreigners unharmed, and that there had been no danger. But France was now in military occupation, at an expense, officially stated in the French parliament of \$29,000,000. And this is not the end: the Moors have risen and new military preparations are making. When it is remembered that French expenditure equals that of the United States; that the debt is six times as great and the population but about two fifths, the wisdom of her adventure would seem doubtful. It is pretty evident that France is embarked in a very serious and expensive project, and there is no telling also what the effect will be upon Mohammedans in general.

Says Mr. Morel, again in the British review mentioned:

It was surely infantile to imagine that Germany was any more likely in 1911 than she was in 1904-05 to agree to France securing Morocco without positive guarantees as to the open door, and without paying her bill of compensation even as France had found it necessary to pay the British, Spanish and Italian bills. To Britain, relief in Egypt; to Spain almost the entire northern and part of the Atlantic coasts of Morocco, with a goodly slice of hinterland thrown in; to Italy, a free hand in Tripoli; to Germany — nothing. The pact of Algeciras to which Germany and ourselves [*i. e.*, Great Britain] were signatories and in which Germany had a peculiar interest was torn up and thrown to the winds.

As a protest Germany sent the *Panther* to Agadir, Spain having already occupied Larache.

It is hardly too much to say that a large part of the British press lost

its head entirely, declaring it insufferable that Germany should do anything to establish a naval base upon the flank of British commerce, Agadir being about as reasonable a point to develop a naval base as would be the moon.

A report that Germany had demanded compensation in the Congo caused an additional inflammation of British sentiment which had voice in the London press. The day after a particularly inflaming article in *The Times*, the Chancellor of the Exchequer made a speech at the Mansion House which was a clear and direct threat of war against Germany. The destruction of the Algeciras agreement by France was wholly ignored and England was ready apparently to plunge Europe into a great war to uphold the action of the Power which had overturned the agreement to which both England herself and Germany were parties.

Meanwhile by England's understanding with Russia, Persia, which gave fair promise of establishing a wholesome government, has been divided into "Spheres of Influence" by these two Powers, and so far as the ordinary man can see, has no longer any independence. And Italy driven by the appropriation of Egypt and of Algiers, Tunis and Morocco, seized the only remaining chance in Africa and occupied Tripoli at the cost of an expensive and still continuing war. The Balkans and the whole of southeastern Europe are, we know, but a slumbering volcano.

I submit that this is a melancholy outlook for the principles of international arbitration. In all that I have mentioned I can, equally with Mr. Low, see no sign of ethical consideration. The whole has been a wave of self-interest apparently as irresistible as a Saharan sand wave.

The principal nations of Europe stand to-day with hands on sword-hilt all on account of the despoilment of a nationality which, because it is from our point of view but half-civilized, is proper prey for the strongest, this strongest in this instance, because she is backed by Great Britain, being France. Deep feeling has been aroused in Germany, and we see the two foremost nations of Europe, the two most highly civilized nations of the world, spending vast sums; the one striving to overtake, the other striving to preserve, supremacy in maritime power. Can anyone say that the game of Morocco was worth the candle? Can anyone say that the swallowing up of a backward nationality for extension of trade and influence is worth a great European war? is worth an abiding

hate between two great kindred nations which should be competing in civilization instead of in hate? Is England to be destroyed by Germany, or Germany to be destroyed by England, or France to disappear as France because the special trader wants an extension of his field? This is the bald analysis of what has happened, and a true statement of the history of the last few years. It would seem that the words *Delenda est Cartago* must be in the heart of many, both German and English. But why this feeling? The Englishman cannot hate the German *per se*, nor the German the Englishman to the extent of desiring the one to annihilate the other. There must be some deep and most powerful reason which does not appear upon the surface of things apart from personality. This reason is in that ever most potent cause of international dissension — trade jealousy, though trade is the creator of our civilization and in itself the most beneficent of human institutions.

Germans, as we all know, have ceased to emigrate as they did. Since 1870 they have to a great degree remained at home and their energies have been turned toward manufactures. There has been a transformation in character of industry, in wealth, in the very face of the land itself, as wonderful perhaps as any in the history of the world.

There are now in Germany some 60,000,000 on a territory about equal to North Carolina, South Carolina, Georgia and Florida taken together. In Great Britain and Ireland are 45,000,000 on an area just about that of New Mexico, who have illimitable possibilities of expansion within the British Empire. Nearly a million more Germans will be in the world in 1913 than in 1912, for that is the country's natural increase. Fifteen years hence there will be a full 80,000,000 of Germans on land which will now grow food for but 60,000,000. The question in the mind of every thoughtful German is: Whence shall come the trade which shall support their extra millions? Where shall they go? Where shall they sell? What shall become of their ever-increasing manufactures? The crux of the situation lies in this last inquiry, which is one common to all the great manufacturing nations. To secure and further their trade the vicious principle of what is called "Spheres of Influence" has been devised. The expression in itself epitomizes the whole of the present great difficulties. It accounts for the Moroccan, Tripolitan, Egyptian, Manchurian and Persian questions, three of which are so agitating the

world at the moment. And the opposition of Great Britain and Germany in these fundamentally vicious partitions which have been going on has brought about a situation which threatens to force war, despite all reason.

The former, too, is coquetting in a marked manner with her ancient foe, Russia. The status of Persia is one of the results. Does the great combination which now forms the triple *entente*, propose, in order to support their several spheres of influence, to fence in or reduce Germany to nullity? If so, and if as a result of a gigantic war Germany should succumb, Russia would be the great beneficiary. Europe would be dominated by the Slav. Can we wonder that Germany adds two army corps and increases her fleet? Is she not only following the great law of self-preservation against what would seem the fatuous action of other Powers whose true interest, if a reduction in armaments is desirable, is to give all equal opportunities for trade and investments with those who have extended their holdings so enormously? Without such a principle there can be no real peace. This it seems to me is the plain matter of fact with which we have to reckon. In the face of the events of last summer, arbitration must be but the pursuit of a will o' the wisp. To make it really effective we must remove, as far as may be, the causes of the violent antagonisms which but a few months ago came so near producing a world convulsion and still threaten one. Our chief propaganda must thus be with the foreign offices of the Powers. It is they which need missionizing as much or more than the heathen. They are all, through designs upon others, through their efforts to advance their own supposed interests, the great enemies of peace.

What follows is not a propaganda of free trade in the usual acceptation of the term, although I am a free-trader in the broadest sense. The question is incidental, but vitally incidental, to that of peace. I believe that were men free to go and come and trade without the artificial hindrances which have been set up (and which, be it said, have slowly lessened from age to age), a vastly different condition from the point of view of peace would be created. Cobden saw with clear vision when he foretold that freedom of trade would finally be the great factor which would make for peace. The world situation which I have just sketched, and which has been produced by the very contravention of his dictum,

is the strongest proof of its truth. If peace is to come at all throughout the world, it will not come until we shall have everywhere the open door, with no more restriction upon trade than there is upon the swapping of penknives. The custom-house and special advantage are the principal great opponents of peace. If all were equally free to trade and exploit there would be no demanding of expansion or special spheres of influence. I have only used Germany to point a moral, as it is she who suffers most under the prevailing system. It is to-day perhaps the foremost of the races productive of civilization. It is foremost in chemistry, hygiene, in municipal organization and municipal government and in most other things which make for the material uplift, at least, of man. It is a great race close akin to the Anglo-Saxon. Can anyone say that its spread would be to the detriment of the human race? or that its decadence would not be an injury to all? If there were millions of Germans in Africa and in South America, citizens of the countries to which they are emigrants, would Africa and South America be the worse? Their presence there would not mean the extension of the hegemony of the German Empire any more than does the presence of millions of Germans in the United States. But if the principle of "Spheres of Influence" is to hold, we find the one nation which most needs an outlet, prevented by circumstances which can only be overcome, as things now are, by war. Russia has a practically unlimited area, Great Britain has made almost a third of the world British, France, at a standstill in population, has a colonial area nearly a third larger than the United States. Looked at in this way, one can understand somewhat German feeling, and the tension which is now of so threatening a character. Shall it continue or shall the nations agree to a policy which shall mitigate the commercial rivalry which is at the bottom of it all?

By so much as in physical disease prevention is better than cure, so would be a firm step toward the removal of the causes of quarrels which lead to war instead of curing the quarrels after they have been set agoing. Coming thus to a concrete suggestion: Would it not be within the range of the possible to bring about an international conference with the object of throwing open to absolute equality of trade and opportunity, all of the vast territories belonging to barbarous and backward peoples which have been appropriated in late years as special spheres of interest? Why

should not the convention of Algeciras of only six years since, which so fully recognized this general right, but which has so unfortunately and so unceremoniously been overturned, to the great detriment of the world's peace and international goodfellowship, be reverted to and extended to all the vast regions of half civilization and barbarism which have been appropriated by individual nations in, say, the last forty years. They have seized and enclosed what may be called the "commons" of the world. My suggestion is that whosoever may be the administrators, they should put nothing more in the way of other nationals than they do in the way of their own. If such an end should be reached by a conference such as suggested, there would be thrown open to free trade and equal commercial exploitation, more than six and a half million square miles of territory, which would include Morocco with its 219,000, the Congo State with 900,000, French equatorial Africa, with 806,000, the French Sahara with 1,544,000, German Africa with 931,000, Madagascar with 227,000, British equatorial Africa with 840,000, Tripoli with 398,000, Manchuria with 364,000, not to speak of Persia and much else. Nor would I omit the Philippines from such an arrangement. What has been mentioned would make an area twice as large as the United States. Much of it may now seem not over-valuable, but who can tell what minerals (which are the basis of the world's industries), may be hidden say in the Sahara, for example? In any case, segregation in exploitation means wars; the open door means peace, and if you want peace you must first make war upon this great evil of special spheres of interest, just as America is now engaged in war against special interior trusts.

This, it seems to me, is the natural course of reasoning, unless human reasoning is itself worthless, as it so often is, and must be. We do not know enough of the All-Powerful Mind to know all its workings by any means. The psychics of such things may lie much deeper than we know. It may be that the struggle of races by war for racial reasons alone must go on yet for ages, as the Englishman first quoted thinks. But one thing would seem certain: that with the vast areas mentioned thrown open as proposed, no country, as Germany does to-day, would feel the need of expansion for strictly commercial reasons. Any crisis such as that of last summer (and which is far from having disappeared), could only

occur for very different reasons: nations would have to go much farther to seek a quarrel.

Undoubtedly there would be great difficulties in accomplishing such a proposal, but the fact that it was accepted in 1906 for Morocco is evidence that it is not an abnormality which cannot be reasoned about. That the Moroccan agreement was overthrown in the way it was, is no argument against its feasibility. Certainly one resultant would be an improvement in world character, and is not the building of character of greater moment than the building of great fortunes, and is not character the real aim of humanity if it has a real aim at all? In any case we have in our hands the means of reducing international antagonisms in very large degree and international statesmanship should be equal to the solution suggested.

The gist of these remarks is that we need a little more Christianity in the chancelleries of the world, that we need more of the brotherhood of man, and it is only by cultivating and encouraging this brotherhood that we are going to abolish war. Paper conventions will not do it. We have just seen how easily they are set aside. You have got to remove the causes, just as we have stopped yellow fever by the destruction of the cause. The deadly microbe producing war is "special commercial advantage." It is this for which the statesman works; it is for this that *Ententes*, and *Dreibunds* exist. I read in Arthur Christopher Benson's delightful book *The Leaves of the Tree*, that "The patriot, in his zeal for the well being of a nation, is forced to plan the downfall and control of another nation. A Church that claims to win its inspiration from the following of Christ in one manner feels bound to work for the extinction of a Church which worships Him after another manner. And" he goes on to say, "these very hostilities seem to develop the highest qualities of the human spirit, courage, fervor and self-sacrifice."

That the first part of this thesis is true, at the present at least, would seem indisputable. Is it to continue so? The events of last year indicate no sign of a change as yet, but the thesis, although that of a son of an archbishop of Canterbury, certainly is not Christian.

There will be many things of a surprising sort in the coming centuries. We must take for granted that man has yet some time to live. There will yet be many shufflings of his scheme of life. Who twelve years ago

would have said that Japan would to-day be one of the great forces of the world, China a republic, and that we, with the extension of trade, as always the moving cause, should be an Asiatic Power? Let us turn somewhat at least from missioning the two former and missionize for a while the Christian Powers. They need it far more than China or Japan. If we are in earnest in our pursuit of peace, we cannot ignore this struggle for special commercial advantage which has resulted in fencing off by the Powers, in their own interest, so much of the world to which they have no inherent right whatever.

F. E. CHADWICK.

THE ARBITRATION TREATIES AND THE SENATE AMENDMENTS *

Referring to the identic general arbitration treaties recently negotiated with Great Britain and France, President Taft remarks, in a recent magazine article: "They have amended the treaty in the Senate and have put in so many exceptions that really it is very doubtful whether the adoption of such a treaty will be a step forward."¹

It is the purpose of the present article to consider the Senate amendments to the arbitration treaties with a view to offering some suggestions upon the question which President Taft thus raises, namely, whether or not the exchange of ratifications and putting into effect of the general arbitration treaties with Great Britain and France, as amended by the Senate, will or will not be a step forward toward the goal of peace through justice. As a foundation for an intelligent discussion of this question it seems desirable to emphasize some points with regard to the purpose and fundamental theory of the treaties as originally drawn and the success with which this theory has been embodied in the language of the treaties.

There appears to be one thing about which nearly all the friends of the treaties may be said to have agreed, that is, that the chief value of the treaties, as negotiated, was indirect and general, not immediate and definite as between the contracting parties. They were chiefly valuable, not because these particular treaties would prevent war between the signatory nations, for "war between the United States and England or the United States and France was inconceivable if not impossible."²

The great value of these treaties, as originally drawn, lay in the fact that they were to be models for other treaties between the United States

* This article is based on an address delivered at the Eighteenth Lake Mohonk Conference on International Arbitration. The considerations therein set forth have been somewhat developed and notes and references have been added, but the original phraseology has been substantially retained.

¹ *The World's Work* for June, 1912, p. 174.

² Senator Lodge's address in the Senate, Feb. 29, 1912, S. Doc. 353, 62 Cong., 2 sess., p. 5.

and other countries and were to afford inspiration for the conclusion of similar treaties between all the great nations of the world.³

So, in considering the effect of the Senate amendments to the treaties, it is submitted that we should keep steadily in mind this point of view, that the treaties are of no particular practical value in themselves as between the contracting parties, that their value lies in their future usefulness by way of suggestion and inspiration, and, therefore, if the Senate amendments have robbed them of that potential usefulness then they are of no particular value at all in their present condition and ought not to be ratified.

The Secretary of State, in describing these treaties in his Cincinnati address, pointed out their great underlying principle. We are constantly told that some things can not be arbitrated. The treaties accepted, as Secretary Knox said, the distinction between those matters

³ In President Taft's address to the Methodist Chautauqua, at Mountain Lake Park, Maryland, August 7, 1911, he said:

"Treaties with England and France are of the utmost importance, not in the actual prevention of war between those countries, because the danger of such a cataclysm as that is, thank God, most remote, but they are most important as steps toward the settlement of all international controversies between all countries by peaceable means and by arbitration. The fact that two great nations like Great Britain and the United States, or like France and the United States, should be willing to submit all controversies to a peaceful and impartial tribunal can not but work for righteousness among the nations, and for a willingness on their part to adopt the same means for the settlement of international disputes. (*Addresses of President Taft on Arbitration*, published by the Government Printing Office, pp. 42-43.)

See also President Taft's address before the Christian Endeavor Convention, Young's Pier, Atlantic City, New Jersey, July 7, 1911, *ibid.*, p. 36; and his address at the Marion, Indiana, Branch of the National Home for Disabled Volunteer Soldiers, July 2, 1911, *ibid.*, p. 30.

In Senator Root's speech in the Senate, March 7, 1912, he said:

"It is not so much that I think these treaties will lead to the arbitration of questions between this country and Great Britain and France, which would not otherwise be arbitrated, that I want them ratified; it is because the moral effect upon mankind of the Government of the United States taking what is believed to be a step forward as compared with the moral effect of the Government of the United States refusing what is believed to be a step forward will make for the education of mankind along the lines of civilization or the retardation of their progress along those lines." (*Cong. Record*, Vol. 48, No. 73, p. 3050.)

See also Senator Lodge's remarks to the same general effect in his speech in the Senate, S. Doc. 353, 62 Cong., 2 sess., p. 10.

"which in their nature are arbitrable and those which are not. As to those which are arbitrable it is provided that they shall be arbitrated. As to those which are not arbitrable it is provided that they shall be the subject of deliberate inquiry, investigation and advice."⁴

It is this recognition of the fundamental distinction which "exists in the nature of things"⁵ between those things which are and are not susceptible of judicial settlement, and this bold and unqualified acceptance of the logical result of this distinction, which gives to the recent treaties both their logical and their moral value as models for the future.

The treaties embodied that principle in words which have since become very familiar, by providing that all differences "which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity" shall be arbitrated. In spite of all the discussion and criticism which has raged around these words it is believed that they stand, to-day, unshaken. It is submitted that they are the best words which have yet been suggested for the purpose intended.

The word "justiciable," if tested by Webster's dictionary, means exactly what the negotiations of the treaty had in mind, namely, "liable to trial in a court of justice; subject to jurisdiction; judicable." It means in the treaties exactly what it meant when the Supreme Court used it, while the arbitration treaties were still before the Senate, in *Pacific States Telephone Company v. Oregon*, the case in which it was attempted to draw in question the constitutionality of the initiative and referendum. In dismissing the case for want of jurisdiction the court drew the distinction between "judicial authority over justiciable controversies and legislative power as to purely political questions."⁶

In like manner it is submitted that the words "law or equity" are fortunate in their associations and history. They are not new. They are consecrated by a century of use in arbitration conventions and practice before arbitral tribunals. They are as old as international arbitra-

⁴ *Address of Secretary Knox on the Pending Arbitration Treaties*, before the American Society for the Judicial Settlement of International Disputes, Cincinnati, Ohio, November 8, 1911; S. Doc. 298, 62 Cong., 2 sess., p. 4.

⁵ See Senator Root's address, *Cong. Record*, Vol. 48, No. 73, p. 3047.

⁶ *Pacific States Telephone and Telegraph Company v. Oregon*, 223 U. S. 118 at 149.

tion in the modern sense of the word. From Jay's treaty of 1794, which ushered in our modern era of international arbitration, to the Prize Court Convention, to which the Senate has but lately given its advice and consent, the words "justice and equity," which are, for all practical purposes, the equivalent of the words "law or equity" used in the present treaties, have been repeatedly used in arbitration treaties, some of these treaties providing for the submission of many cases to arbitration, as defining the principles which should guide arbitral courts.⁷

And yet very rarely in this century of practical user has any serious difficulty been found in the meaning of the words "justice and equity." Occasionally a question has been raised and, once or twice, the construction apparently placed upon those words in the majority report of the Senate Committee on Foreign Relations, namely, that they permit of

⁷ The following chronological list of arbitration treaties of the United States using the expression "justice and equity" or its equivalent makes no pretense of being complete: Great Britain, Treaty of Amity, Commerce and Navigation (Jay Treaty), November 19, 1794, Article VI; Great Britain, Convention respecting Fisheries, Boundary and the Restoration of Slaves, October 20, 1818; Great Britain, Claims Convention, February 8, 1853; Costa Rica, Claims Convention, July 2, 1860; Great Britain, Treaty for Settlement of Claims with the Hudson's Bay Company, etc., July 1, 1863; Great Britain, Treaty of Washington, May 8, 1871, Article XII (Claims arising during the Civil War aside from the Alabama Claims).

The following treaties or conventions use language the same or substantially the same as the Seventh Article of the Jay Treaty with Great Britain, which reads: "according to the merits of the several cases and to justice, equity and the laws of nations": Spain, Treaty of Friendship, Boundary, etc., October 27, 1795, Article XXI (Claims arising during the war between Spain and France); Denmark, Claims Convention, March 28, 1830; Peru, Claims Convention, January 12, 1863; Mexico, Claims Convention, July 4, 1868. (See *Treaties and Conventions of the United States*, *passim*. See, also, *Argument of the United States, Orinoco Steamship Case before the Hague Tribunal*, page 117, note.)

Article VII of the Prize Court Convention, adopted by the Second Hague Conference, of 1907, and recently advised and consented to by the Senate of the United States, provides that in the absence of any controlling treaty provisions or generally recognized rule of international law, "the court shall give judgment in accordance with the general principles of justice and equity" (see Scott's *Hague Texts*, page 289 at 293), while Article VII of the Pecuniary Claims Convention with Great Britain, signed August 18, 1910, makes it the duty of the members of the tribunal, upon assuming their functions, to take oath to decide "in accordance with treaty rights and with the principles of international law and of equity." (See SUPPLEMENT, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 5, 1911, p. 257 at 260.)

the exercise of a vague and unlimited jurisdiction,⁸ has been advanced before some arbitral tribunal. Once, before the British-American Claims Commission which sat at the end of the Civil War, the suggestion was made that the words "justice and equity" were very broad and that they gave the court unrestricted liberty of decision within the purview of its own conscience, and, in a very interesting opinion, Mr. Commissioner Frazier, the American Commissioner, negated this suggestion.⁹

Again, in 1903, a number of nations entered into arbitration protocols with Venezuela in substantially identical language. By the terms of these protocols the arbitrators were empowered to decide in accordance with "absolute equity without regard to objections of a technical nature, or of the provisions of local legislation." The umpire of the American-Venezuelan Commission did rule, in certain cases, as if he thought that those words actually gave him unrestricted liberty to decide one way in one case and another in another according to his individual conscience

⁸ The report of the majority of the Senate Committee on Foreign Relations used the following language in discussing this point:

"The definition of the questions to be submitted to arbitration in these new treaties is, it is true, very large and general and somewhat indeterminate. * * * We are obliged, therefore, to construe the word 'equity' in its broad and universal acceptance as that which is 'equally right and just to all concerned; as the application of the dictates of good conscience to the settlement of controversies.' It will be seen, therefore, that there is little or no limit to the questions which might be brought within this article, provided the two contracting parties consider them justiciable." (S. Doc. 98, 62 Cong., 1 sess., pp. 4 and 5.)

Senator Lodge, who submitted this report, commented upon this passage as follows in his address in the Senate:

"We are equally destitute of any authoritative definition or determination or interpretation as to the significance of the words 'law or equity' in this international connection. The senator from Maryland said that the committee had interpreted the word 'equity' wrongly in arguing that the use of that word in these treaties would open the door to questions of every kind. The committee in its report and in what was there said about the words 'law and equity' did not intend to suggest that these words of and by themselves opened the door to an unlimited range of questions. All the committee desired to suggest was that 'law or equity,' like the word 'justiciable,' in this connection entirely lacked any authoritative definition or interpretation." (S. Doc. 353, 62 Cong., 2 sess., pp. 11-12.)

⁹ See report of Robert S. Hale, Agent of the United States, Ex. Doc. 1, Pt. 1, 43 Cong., 1 sess., pp. 246-247. (*Foreign Relations of the United States*, 1873, Vol. III.)

or personal idiosyncrasy, without any particular reference to consistency or to the recognized rules of law.¹⁰

When one of the decisions so rendered, the Orinoco Steamship Case, was taken before the Hague court for review, the Venezuelan agent defended the umpire's decision upon the specific ground, which he said was his "capital argument," that the words "absolute equity" gave absolute liberty, and that the umpire could not have transgressed the rules of law laid down in the protocol because he was not bound by any rules.¹¹

But the Hague court held that the words "absolute equity" did not "invest the arbitrators with discretionary powers" or excuse them from applying the rules of law prescribed by the terms of the submission and, holding that the umpire had transgressed these rules, the court set aside his decision.¹²

So that the very objection now made to the word "equity," namely, that it sets the court adrift without rudder or compass, has been squarely raised in the court of last resort with respect to international matters and has been held to be without merit. And it should be remembered, in this connection, in appraising the weight and relevancy of these decisions and of the one hundred years of practice which they typify, that if there is any difference between the words of the present treaty, "law or equity," and the words which have heretofore been used, "justice and equity," that "law" is certainly a more restricted word than

¹⁰ See Moore's *International Law Digest*, Vol. VI, pp. 304-307. See also *Correspondence relating to Wrongs done to American Citizens by the Government of Venezuela*, S. Doc. 413, 60 Cong., 1 sess., pp. 82-84.

¹¹ "Etant donnée la liberté absolue d'appréciation que le Compromis de 1903 a conféré aux Arbitres, le Gouvernement des Etats-Unis est sans droit pour demander la nullité de la sentence, même dans l'hypothèse, à tous points de vue erronée, qu'elle serait entachée des vices qu'il lui attribue. Voici le principal raisonnement que fait par ma bouche le Gouvernement du Venezuela." (*Oral Argument of Dr. Grisanti, Venezuelan Agent, before the Hague Tribunal in the Orinoco Steamship Case*. Plaidores, pp. 47-48.) And again — "L'argument capital que j'apporte pour la défense de l'absolue validité de la sentence de l'honorable Dr. Barge, est que les termes du protocole de 1903 donnent aux Arbitres la plus grande liberté pour juger * * * ." (*Ibid.*, pages 78-79.)

¹² See decision of the Hague Tribunal in the Orinoco Steamship Company Case, this JOURNAL, Vol. V, p. 230, at p. 233. See, also, Orinoco Steamship Company Case before the Hague Tribunal, *ibid.*, pp. 39-50.

"justice" and that "equity" can not be broader than "absolute equity."¹³

This expression, "justice and equity," with its equivalents, has acquired in the realm of international law a meaning through user the same in kind, although not of course the same in degree, that the phrase "due process of law" has taken on in our constitutional law through long custom and many judicial decisions. The term "justiciable" and the phrase "justice and equity" or "law or equity" resemble the expression "due process of law" in still another respect. They not only have acquired, at least as to certain fundamental points, a definition through time and user, but they tend, as Senator Root said in the Senate, "toward a rather broad treatment by exclusion and inclusion"¹⁴ thus leaving scope and opportunity for further definition as occasion arises growing out of conditions as yet unforeseen and unforeseeable. It is submitted that the negotiators of the treaties did well in selecting these general expressions, already defined as to essentials by a user as old as international arbitration, and yet capable of further definition as occasion arises to meet the needs of an expanding future.

So much for the treatment in the treaties of matters in their nature justiciable. As regards the other great division of international differences, those not susceptible of judicial decision, the treaty provided that they should be referred to a joint commission for investigation and consideration. And then there was the provision, clause three of Article III, which empowered the joint commission, in cases in which the parties disagreed as to whether or not a given question was justiciable, to decide whether or not such question came within the terms of Article I and was justiciable in its nature.

There arose a difference of opinion as to the proper construction of this clause, *i. e.*, as to whether the decision of the joint commission as to a question of justiciability was final and binding upon both governments, as its language seemed *prima facie* to import, or whether, when construed

¹³ It is true that in the *Orinoco Steamship Case* the court might have reached the same conclusion by interpreting the words "without regard to objections of a technical nature, etc.," as modifying an irresponsible liberty otherwise conferred by the words "absolute equity," but there is no suggestion of such a view in the opinion.

¹⁴ *Cong. Record*, Vol. 48, No. 73, p. 3047.

in connection with other provisions of the treaty, it was merely binding upon the executive, leaving to the United States Senate unimpaired its power to decide for itself, irrespective of the decision of the commission, whether any question was or was not justiciable.¹⁵

The majority of the Senate Committee on Foreign Relations, and many friends of the treaties both in and out of the Senate, construed the clause as making the decision of the joint commission final and binding upon both governments. On the other hand, the Secretary of State, the negotiator of the treaty, in a most interesting and able argument, took the opposite view, which was accepted by many leading lawyers in and out of Congress.¹⁶ President Taft, who, in his earlier addresses regarding the treaties, apparently assumed that the decision of the commission would be binding upon both governments with no

¹⁵ For a more detailed consideration of the arguments *pro* and *con* on this question of construction see "The Pending Arbitration Treaty with Great Britain" in the *University of Pennsylvania Law Review* for March, 1912.

¹⁶ Among the Senators who, in the course of the debate, expressed the opinion that the decision of the joint commission under this paragraph would be binding upon the Senate, were Senators Bacon (*Cong. Record*, Vol. 48, No. 75, p. 3241 at 3248), Smith of Georgia (*Ibid.*, No. 76, p. 3332 at 3336 and 3337), Smith of Michigan (*Ibid.*, No. 72, p. 2983 at 2988, etc.), who favored amending the treaty by striking out the paragraph in question; Senator Rayner (*Ibid.*, No. 28, pp. 1027 to 1030; compare p. 3249) who nevertheless favored the adoption of the paragraph as it stood; Senator Root (*Ibid.*, No. 73, p. 3049), who suggested in his minority report (with Senator Cullom) a declaratory amendment to the resolution of ratification (S. Doc., No. 98, 62 Cong., 1 sess., pp. 10, 27); and Senator Lodge who presented a declaratory amendment construing the paragraph in a contrary sense. Among the Senators who accepted the interpretation of the Secretary of State were Senators Burton, who made a special minority report in this sense (S. Doc. 98, 62 Cong., 1 sess., pp. 11-15), which he supported on the floor of the Senate (*Cong. Record*, Vol. 48, No. 77, pp. 3385-3386), and McCumber (*Ibid.*, No. 33, p. 1280 *et seq.*), who favored the treaty without amendment but were ready to accept the Lodge declaratory amendment. (Compare the position of Senator Williams, *Ibid.*, No. 72, p. 3032, at 3038, see also p. 3249).

Senator Bacon, in the course of his address, remarked:

"I want right in that particular to call attention to a very remarkable fact, that of all the Senators who advocate these treaties in their present form, no two of them agree in the construction of that third clause, or at least, no two of them agree in the construction and also in the application of it. Perhaps I ought to make an exception in the case of the Senator from Illinois [Mr. Cullom] and the Senator from New York, [Mr. Root] because they did join in the same report and, therefore, they do agree." (*Cong. Record*, p. 3248.)

locus poenitentiae, later on seems to have accepted Secretary Knox's view.^{16a}

It was of course unfortunate that any question of construction should have arisen, but once it had arisen and a serious difference of opinion even among the friends of the treaties had developed, it became highly desirable, if not absolutely necessary, to place the meaning of the provision beyond doubt.¹⁷

Accordingly, a resolution was introduced by Senator Lodge which, if adopted, would have cured any possible ambiguity, as he said, by giving "to that clause * * * the meaning which those who favor the unamended treaty say it now possesses and which the rest of the world say it ought to have." And the Senator added: "such a proposition is entitled to command every vote."¹⁸

However, the Senate chose to cure the difficulties supposed to arise out of the third clause of Article III by striking out the paragraph in question. While it is believed that the suppression of the entire paragraph and the elimination of the moral advantage which might have

^{16a} See particularly his address at Ocean Grove, August 15, 1911; at Rochester, August 23, 1911, in *Addresses of President Taft on Arbitration*, published by the Government Printing Office, pp. 47-66, especially pages 51, 53, 62 and 63; and at Cincinnati, November 7, 1911, in *Proceedings of the American Society for the Judicial Settlement of International Disputes*, p. 12.

¹⁷ See Senator Lodge's address in the Senate, S. Doc. 353, 62 Cong., 2 sess., p. 13; Senator Root's address, *Cong. Record*, p. 3049.

¹⁸ See Senator Lodge's address, *supra*, p. 26. The pertinent portion of Senator Lodge's resolution reads as follows:

"Resolved further, That the Senate advise and consent to the ratification of the treaty with the understanding, to be made a part of such ratification, that any joint high commission of inquiry to which shall be referred the question as to whether or not a difference is subject to arbitration under Article I of the treaty, as provided by Article III thereof, the American members of such commission shall be appointed by the President, subject to the advice and consent of the Senate, and with the further understanding that the reservation in Article I of the treaty that the special agreement in each case shall be made by the President by and with the advice and consent of the Senate means the concurrence of the Senate in the full exercise of its constitutional powers in respect to every special agreement, whether submitted to the Senate as the result of the report of a joint high commission of inquiry under Article III or otherwise." (S. Doc. 98, 62 Cong., 2 sess., p. 25; italics ours.) The adoption of this resolution would also have cured any constitutional difficulty which might be thought to have arisen with respect to the third paragraph of Article III as interpreted by the majority of the Committee on Foreign Relations.

been derived from the decision of the commission as to questions of justiciability, even although it was not binding upon the Senate, was unfortunate, it is submitted that it was by no means fatal. It left the treaties incomplete, it is true, but not unsymmetrical. So far as they went they were sound and logical and paragraph three of Article III, or some satisfactory equivalent, might have been added in the fulness of time. It is not believed, therefore, that the amendment eliminating paragraph three of Article III should, of itself, prevent the ratification of the treaties in due course.

This leaves for consideration the two remaining Senate amendments. One of these, affecting the text of the first article, was merely verbal and need not detain us. But the amendment to the resolution of ratification, introduced by Senator Bacon and adopted by the decisive vote of 46 to 36, is, it is submitted, fatal to the treaties in that it destroys their usefulness as models for other treaties and by way of inspiration for further progress. The full text of the Bacon amendment is as follows:

Provided, That the Senate advises and consents to the ratification of the said treaty with the understanding, to be made a part of such ratification, that the treaty does not authorize the submission to arbitration of any question which affects the admission of aliens into the United States, or the admission of aliens to the educational institutions of the several States, or the territorial integrity of the several States or of the United States, or concerning the question of the alleged indebtedness or monied obligation of any State of the United States, or any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine, or other purely governmental policy.^{18a}

The latter part of this amendment, relating to the Monroe Doctrine and other matters of governmental policy, substantially embodies the amendment suggested by way of greater caution by Senators Root and Cullom in their minority report.¹⁹ Inasmuch as questions of governmental policy are clearly not justiciable, this portion of the amendment seems to be harmless, even if unnecessary. But aside from questions involving the Monroe Doctrine "or other purely governmental policy,"

^{18a} See *Cong. Record*, Vol. 48, No. 73, p. 3054.

¹⁹ See S. Doc. 98, 62 Cong., 1 sess., reprint, pp. 10, 27.

this amendment specifically exempts from the scope of the treaty the following questions:

First, "any question which affects the admission of aliens into the United States." Such a question might arise in many ways. It might involve merely the interpretation of a treaty in force between the United States and some other country, and so be clearly justiciable. On the other hand, it might involve the large question as to whether this country ought or ought not to adopt a certain policy with respect to the admission of aliens, clearly a non-justiciable question. Whether or not we have violated a treaty with respect to the admission of aliens which we have already made is a matter for judicial determination. Whether, in the absence of any existing obligation, we ought to incur one, whether through statute or treaty, is a political question which cannot be submitted to arbitration. But the text of the amendment withdraws both the justiciable and the non-justiciable question from the scope of the treaty, and Senator Bacon's speech in the Senate indicates that such was his intention in framing the amendment.²⁰

Second, "the admission of aliens to the educational institutions of the several States." Again, this involves questions that may or may not be justiciable. The particular question which undoubtedly suggested this exception, the question of the exclusion of the Japanese from the schools of San Francisco, arose under our treaty with Japan and was clearly justiciable, and, if it had not been possible to adjust that question by diplomacy, it is submitted that we ought to have been ready to submit it to arbitration. But, of course, a similar question might arise in the absence of any treaty in such a way as to involve only questions of governmental policy. This exception is, like the first exception, destructive of the theory upon which the treaties rest, because it covers matters which are clearly justiciable. But it is open to the further serious objection that it involves what be may deemed a discourtesy to Japan, one of the very nations with which serious questions might arise, growing out of our intricate relations in the Pacific, and, therefore, one of the very nations with which it would be most desirable to negotiate a general treaty of arbitration. With what prospect of success can we request Japan to negotiate a treaty in accordance with this model, which

²⁰ See *Cong. Record*, Vol. 48, No. 75, p. 3243.

is not only illogical, but carries on its face a direct reference to a most regrettable incident in our relations with Japan, which we ought to seek to forget as rapidly as possible?

Third, "the territorial integrity of the several States or of the United States." As to this point, as Secretary Knox said in his Cincinnati address, "a living nation must have a place to live in,"²¹ or, as Senator Root put it, "questions that involve the nation's having a place in which to live cannot be submitted to the decision of anybody else or the nation has lost its independence."²²

A land to live in, like independence, would seem to be a necessary prerequisite to any arbitration rather than a matter of policy, but, in any event, the question whether we are to have one or not is non-justiciable.

But the language of the amendment under consideration, "the territorial integrity of the several States or of the United States," covers not merely this non-justiciable question, but boundary disputes which, as Secretary Knox remarked, "ever since the nation was born we have submitted to arbitration."²³ Every foot of our northern boundary from the Atlantic Ocean to the Lake of the Woods has been the subject of formal arbitration or of the decision of a joint commission, and the same thing is true on the Pacific Coast from the Straits of San Juan to the Arctic Ocean.

These arbitrations began with the Jay treaty of 1794 and perhaps the last great question was settled by the Alaska Award of 1903. But, as was pointed out in the debate in the Senate, minor questions are still pending and may be pressed for arbitration at any time.²⁴ They may, moreover, at the request of either party, at any time be submitted for examination and report to the International Boundary Commission of the United States and Canada, in accordance with the recent treaty of January 11, 1909. A similar International Boundary Commission is empowered to decide, subject to objection on the part of either government, all boundary questions arising along the twelve hundred miles where

²¹ S. Doc. 298, 62 Cong., 2 sess., p. 10.

²² *Cong. Record*, Vol. 48, p. 3047.

²³ See reference, *supra*.

²⁴ *Cong. Record*, Vol. 48, No. 72, p. 2987.

the Rio Grande forms our southern boundary. And, only a year ago, the International Boundary Commission, United States and Mexico, having failed to agree with respect to a question of boundary, the two countries provided for the addition of a third member to the commission in order that there might be an arbitration to settle the question of international title involved. And yet, in case the pending arbitration treaty with Great Britain is ratified, as amended, or in case an identical treaty were negotiated and ratified with Mexico, we would be precluded from submitting to arbitration under either of these treaties ordinary boundary questions which the respective international boundary commissions had not been able to settle to the satisfaction of both parties.

It is said, indeed, that if the amended treaty is adopted, we can still negotiate special treaties to cover questions such as these, proper for arbitration, but which are excluded from arbitration by the Bacon amendment. So we can, now, without the general arbitration treaty. So we could and did last year with Mexico. But wherein will it be easier to arrange such special arbitrations after we have gone on record by excluding such questions from the terms of our general arbitration treaties and thereby giving *prima facie* notice, at least, to foreign nations that we no longer propose to arbitrate them?

Finally, we have the exception "concerning the question of the alleged indebtedness or monied obligation of any State of the United States." Here we have an exception which is altogether aimed at the exclusion of justiciable questions. As Senator Lodge remarked in discussing the matter, "if a pecuniary claim is not justiciable I do not know what is."²⁵

For historical reasons, however, which seem sufficient to a great many people in this country, when it comes to the repudiated reconstruction bonds, "we separate them and take them out from the ordinary class of pecuniary claims,"²⁶ and, of course, it was this particular class of indebtedness which was aimed at by this amendment. But this question of the reconstruction bonds had already been taken care of by the language of the first article of the treaty, which provided for the submission only of differences "hereafter arising," thus, by lan-

²⁵ *Cong. Record*, Vol. 48, p. 3050.

²⁶ Senator Lodge's address in the Senate, S. Doc. 353, 62 Cong., 2 sess., p. 24.

guage at once general and inoffensive, which in no wise interferes with the logic of the treaties, meeting the insuperable practical objection to the submission of questions growing out of the reconstruction bonds to arbitration.

The amendment, however, excludes not merely questions arising out of the transactions of reconstruction days, but all questions, at any time arising, with respect to the indebtedness of any State of the United States, thus not merely preventing the reopening of certain very unhappy transactions in the past but amounting to a general repudiation on our part, in advance, of the application of judicial methods to the settlement of such questions in the future; and this although the United States is not only a signatory, but was the proposer and chief advocate of the Hague convention respecting the limitation of the employment of force for the recovery of contract debts, which aims at securing the submission to arbitration of questions growing out of the failure of the signatory countries to meet their public debt, as well as other questions of contract indebtedness.^{26a} It is believed that this feature of the Senate amendment is at once unnecessary, illogical and susceptible of giving offense to foreign governments.²⁷

^{26a} See *Treaties and Conventions*, pp. 2248-2258, at 2254. See also Scott, *The Hague Peace Conferences*, Vol. I, pp. 415-422.

²⁷ Senator Bacon said in his speech in the Senate referring to the question of the Southern bonds:

"I do assert it as a fact of which I am as confident as I am of anything else that I have no personal knowledge of that there is now in the State Department, or has been in the recent past, one or more demands or suggestions upon the part of foreign governments upon the Federal Government to take up this question of the bonds of the Southern States which were not paid. If I am wrong about that I invite correction of it, not only here but elsewhere." (*Cong. Record* for March 9, 1912, Vol. 48, p. 3245.)

If the Senator is right in this statement it would seem that the refusal of the Senate to accept the conclusive and yet inoffensive general terms in which the negotiators of the treaties have arranged to lay the ghost of the southern bonds was peculiarly unfortunate. If such representations have been made it requires no stretch of the imagination to guess that they have been made by some of the leading commercial nations of Europe such as England, France or Germany, where the foreign holders of the repudiated southern bonds for the most part reside.

Germany and Japan are, perhaps, the two foreign nations with whom it would be of the most practical importance to conclude general arbitration treaties, and yet one clause of the Bacon amendment, the provision with respect to the admission of

In conclusion, it is submitted that this amendment has destroyed the symmetry of the arbitration treaties, has done away with their logical quality, has vitiated the fundamental principle upon which they rested so that they are no longer in fact general treaties of arbitration²⁸ and, furthermore, that certain provisions of the amendment are directly calculated to irritate foreign nations with whom it is most important for us to negotiate treaties of general arbitration.

It is believed that the arbitration treaties with Great Britain and France, as originally drawn and as construed in the Lodge amendment, were bold and statesmanlike documents, a genuine advance over all that had been done before. Whatever disposition may ultimately be made of the treaties, a great part of their mission has been accomplished. "There never was one lost good." In the education which the country at large has received and the better understanding of a great and intricate subject which has come to the Senate itself, through the illuminating discussion which has taken place in and out of Congress; in the inspiration which has come to the friends of peace in all lands through the negotiation of these treaties and the struggle for their adoption, lies a great gain which the ultimate fate of the treaties, whatever it be, can never destroy.

But, returning to the fundamental thesis suggested in the beginning of this article, that the value of these treaties lies in their usefulness as models and in their inspirational power as respects future treaties, and not in their practical utility in preventing war between the contracting parties, it is submitted that to ratify the treaties as amended would, on the whole, hinder rather than help the cause of peace through justice.

WILLIAM CULLEN DENNIS.

aliens to our educational institutions, strikes unquestionably at Japan, and it is quite within the realm of possibility that the exception with respect to State indebtedness, *eo nomine*, may be found to have unnecessarily irritated Germany.

²⁸ In this connection it is interesting to note that the Japanese press is already beginning to suggest that the amended treaties are not treaties of "general arbitration" within the meaning of Article 4 of the revised Anglo-Japanese treaty of alliance, and hence, even if ratified they will not bring into effect the provisions of that article relieving Great Britain from any obligation to go to war with a nation with which it has a "treaty of general arbitration."

THE FRENCH SPOILIATION CLAIMS

PART II

The first article on this subject in the April number of *THE AMERICAN JOURNAL OF INTERNATIONAL LAW* (pp. 359-380), dealt with the general principles upon which these claims have been held by the Court of Claims to have been in their origin valid international demands against France, and to have been assumed as obligations of the United States by force of the treaty of September 30, 1800, the ratifications of which were exchanged July 31, 1801.¹

The present article will be devoted to a review of some of the rules on which the Court of Claims proceeded in the details of its allowances.

VALUE

The following statement in the pamphlet published by John K. Kane, one of the commissioners for the distribution of the French indemnity of 1831, shows the principles upon which that commission proceeded.²

The vessel was generally estimated at her cost to the owner, deducting a reasonable percentage for her subsequent depreciation. The expense of constructing her, as entered in the builder's books of account, and the price paid for her by the claimant, or that for which an interest in her had been sold to others, were of course safe guides to her value at a certain time. The valuation sometimes found in the charter parties, and that stipulated in policies of insurance or embargo bonds, were also valuable, though rarely to be accepted as conclusive; and even modern depositions were sometimes resorted to.

The commission though sitting at such a comparatively early day, stated that even then such evidence was not always obtainable. They therefore laid down the following general rules for the ascertainment of values;³

¹ Public Treaties of the United States, 1875, pp. 224-232.

² Moore's International Arbitrations, Vol. 5, p. 4482.

³ *Ibid.*, p. 4483.

The seizure and description of the vessel, its place of construction, and its age were except in a few cases of foreign built vessels determined easily by the register; and the proximate, or rather the probable value was then fixed by reference to the general table of information which had been collected on the subject. This result was compared with the proofs in each case; and the table was made more accurate for future use by the repeated tests which were thus applied to it.

The cargo when taken at sea was estimated at its price in the market from which it came, and the different charges which had contributed to increase its value. The bills of parcels of the claimants, their invoices — taking care to strike out the debentures on foreign merchandize where they appeared to be included in the price — the sworn value in the manifests of exportation, and a comparison of these in some cases with other similar documents relating to other shipments, or with prices current of the day, enabled the board to fix the original cost with reasonable certainty.

The Court of Claims proceeded on the same principles in the ascertainment of values under the French Spoliation Act of 1885.

PREMIUM OF INSURANCE

The premium of insurance paid by the owner of either the vessel or cargo has been allowed as part of the value of the thing lost. On this point the court has said:

That the premium received, being part of the interest insured and paid, constitutes part of the insurer's loss, which he is entitled to recover.⁴

The commission on the French indemnity of 1831 allowed,—

The fair and ordinary premium of insurance for the immediate voyage, ascertained at the time of shipment and calculated to cover. This premium was regarded as a sufficiently exact equivalent for the hazards of the voyage, and as indicating definitely the increase of value which was gained by encountering them. It was therefore allowed, without inquiring whether the risk had been transferred by contract to an insurer, or was borne by the owner himself.⁵

This same rule for the allowance of a fair premium of insurance for the voyage whether the risk was assumed by an underwriter or by the owner himself has been very generally followed by tribunals passing

⁴ Schooner *Delight*, 21 C. Cls. 430, 441.

⁵ Moore's International Arbitrations, Vol. 5, p. 4483.

upon international claims. Thus, the commission under the Van Ness convention of 1837-1838 allowed "a reasonable or fair premium of insurance for the particular voyage, said premium to be rated with that usual or current at the time of the shipment; and this premium is to be allowed whether the owner was his own insurer or not."⁶

The commission on the Danish indemnity also allowed a premium of insurance without regard to whether actually paid to an underwriter or not.⁷

The Court of Commissioners of Alabama Claims, organized under the Act of June 23, 1874 (18 Statutes at Large, 245) for the distribution of the Geneva Award, allowed to owners of vessels and cargoes which were lost, as a part of their losses the amount of the insurance premium which they had paid. Mr. Hackett, in his work on the Geneva Award Acts, says (p. 109):

Claimants who recovered judgment in the former court were allowed, as an item of loss, the premiums they had paid against both marine and war risks.

So meritorious were claims for insurance premiums regarded as demands against the Geneva Award that the Act of 1882, which re-established that court for the distribution of the balance of the award, specially provided for the allowance of all insurance premiums paid after the sailing of any Confederate cruiser on account of the increased risk thereby occasioned, even though the vessel was not actually captured.⁸

The Court of Claims adopted a rule of less liberality than any of these previous tribunals. It said:

Insurance to cover is that amount of insurance which in case of accident will entirely reimburse the insured for his loss. It includes not only the value of the property, but also the cost of the insurance procured to protect it.

Phillips in his work on insurance thus states the question argued here (Sec. 1221):

"The premium on the premium is to be included in computing the amount to be insured in order to cover the interest and replace the exact value of the subject in case of total loss."

⁶ Moore's International Arbitrations, Vol. 5, p. 4542.

⁷ *Ibid.*, p. 4569.

⁸ Act of June 5, 1882, 22 Statutes at Large, 98, § 5.

Some of the claimants ask that they be allowed unpaid premiums of insurance as an element of the value of property lost, and if so that such premium be allowed upon the theory of insurance to cover.

The able arguments and briefs of counsel for claimants on these questions have been listened to and examined with great care. Whatever difficulty we might find were the matter here presented for the first time is removed by the precedents established by the Supreme Court. In the *Anna Maria* (2 Wharton, 325), the court allowed "the value of the vessel and the prime cost of the cargo with all charges, and the premium of insurance, where it has been paid, with interest." In *Malley v. Shattuck* (2 Cranch, 458), the court said (citing *The Charming Betsey*):

"In pursuance of that rule the rejection of the premium for insurance, that premium not having been paid, is approved; but the rejection of the claim for outfits of the vessel and the necessary advance to the crew is disapproved. Although the general terms used in the case of *The Charming Betsey* would seem to exclude this item from the account, yet the particular question was not under the consideration of the court, and it is conceived to stand on the same principle with the premium of the insurance, if actually paid, which was expressly allowed."

Following the Supreme Court we shall allow premiums of insurance when actually paid, and not otherwise.⁹

Thus, all allowances made by the Court of Claims for insurance premiums as a part of the losses are based upon premiums actually paid, and in no case include "insurance to cover"

FREIGHT

As the capture of a vessel before her arrival at the port of destination deprives her of freight for the voyage, all courts of admiralty allow freight as a part of the damages incurred by the wrongful breaking up of the voyage. The ground of this allowance by the commission on the French indemnity of 1831 was thus stated.¹⁰

As the premium of insurance represents the increase of value which is communicated to goods by the hazards they have encountered, so freight or the cost of carrying them indicates the increase of value they derive from their change of place. There is only this difference between the two; that the right to the full premium is fixed from the commencement of the risk, while the freight is not finally earned till the cargo arrives at the port of delivery. Both contribute to the value of the goods at the time of capture, the premium having imparted its entire amount,

⁹ Schooner *John*, 22 C. Cls. 408, 426.

¹⁰ Moore's International Arbitrations, Vol. 5, pp. 4483, 4484.

as a charge incurred at the time of shipment; the freight imparting such a share of its stipulated amount as is proportioned to the part of the voyage performed, *pro rata itineris peracti*.

In estimating the *pro rata* freight, the board was guided by the practice which obtains in most of our commercial cities in the adjustment of average losses, and fixed it at two-thirds of the full freight on the immediate voyage.

Yet, though the freight was allowed only as an element in the value of goods, it was not always or even generally awarded to the owner of them. The question remained as in all other cases to be settled by facts: Was he the party substantially aggrieved? If he had paid the freight, as was sometimes the case under special contracts, he received it back under the treaty; if he had not, the award was made in favor of the ship owner, as the real loser.

Other courts and commissions passing on international claims have adopted similar rules as to freight. Thus, the Van Ness convention of 1837-1838, deciding upon certain claims for captures made by Spain, adopted a rule that to the value of the vessel there was to be added "two-thirds of a fair freight where the voyage was not completed"¹¹ adding, indeed, a premium of insurance on the freight whether actually paid or not.¹²

The commission of 1832-1833, for the distribution of the Danish indemnity also "allowed two-thirds of a fair freight for the passage in which the loss occurred."¹³

The commission of 1834 on the Neapolitan indemnity allowed in all cases of capture and condemnation "freight, according to the registered tonnage of the vessel, at and after the rate of forty dollars per ton."¹⁴

Sir Edward Thornton, the umpire under the treaty of 1868 for the settlement of claims of citizens of the United States against Mexico, in marine cases "allowed the original value of the goods with the costs of freight, landing, etc." (Moore's International Arbitrations, Vol. 3, p. 3135.)

The two successive Courts of Commissioners of Alabama Claims, organized under the Acts of 1874 and 1882¹⁵ followed the same rule,

¹¹ Moore's International Arbitrations, Vol. 5, p. 4541.

¹² *Ibid.*, p. 4542, Pars. 2d and 5th.

¹³ *Ibid.*, Vol. 5, p. 4568.

¹⁴ *Ibid.*, Vol. 5, p. 4585.

¹⁵ 18 Statutes at Large, 245; 22 Statutes at Large, 98.

although the act expressly excluded "unearned freights, gross freights, prospective profits, freights, gains or advantages." The court, in an elaborate and very able opinion, held that these terms did not prevent the allowance of freight for the voyage which was actually broken up by the Confederate capture out of which the claim arose, and allowed freight at the established rate of two-thirds for the voyage thus broken up.¹⁶

This well settled rule, as established by the decisions of so many tribunals, was in substance adopted by the Court of Claims, which made the following very thorough analysis of this question:¹⁷

The *Nancy* was under charter to sail from Baltimore to Jamaica, there to discharge cargo, reload, and return to Baltimore. While on her way to Jamaica under this charter-party she was seized on the high seas by a French privateer and lost to her owners. The question is now presented as to the basis upon which an allowance for freight should be computed.

It is evident that freight earned is an element of value in the property lost. The ship owner has a right to expect a reasonable return upon his venture, and this return he finds only in the freight money. As between the vessel and the cargo-owner the freight is regarded as an entirety due in no part until the arrival of the vessel at the port of destination. Between these two alone does this rule prevail—as to them the law has placed a certain construction upon the contract of affreightment to which they are parties—a construction well understood, admitted, and certain. As to third parties no such rule prevails, and as against them freight is often recoverable, even when the vessel does not reach her destination. In cases of tort, such as collision, Dr. Lushington says: "The party who had suffered the injury is clearly entitled to an adequate compensation for any loss he may sustain for the detention of the vessel during the period which is necessary for the completion of the repairs, and furnishing the new articles" (2 W. Robinson, 279), and he allowed gross freight, less the ordinary ship's expenses necessary to earn it. As a broad rule this is well enough, but it is not without possible exception, for we may imagine an injury at a time when the vessel is not engaged in freight earning, although even then we probably look to the market for a proper measure of damages.

The case of *The Amiable Nancy* (3 Wheaton, 560), and *Smith v. Condry* (1 How. 35), allowed only the "actual damage sustained by the party at the time and place of injury" without allowance for detention. In *Williamson v. Barrett* (13 Howard, 101), a collision case, the court

¹⁶ *The Geneva Award Acts*, by Frank W. Hackett, pp. 47, 48, and p. 50, note 1.

¹⁷ *Schooner John*, 22 C. Cls. 408, 459-464.

allowed damages for demurrage, adopting the rate of freight, less expenses, as a proper measure, three justices dissenting on the ground that the majority rule introduced too much uncertainty into the case and tended to increase the "stringency, tediousness, and charges of litigation in collision cases." They therefore preferred a rule granting full damages at the time and place of collision, with legal interest on the amount thus ascertained.

The case of the *Baltimore*, arising from collision, was decided in 1869 (8 Wall. 377) the court holding that the suffering party is not limited to compensation for the immediate effects of the injury inflicted, but the claim for compensation may extend to loss of freight, necessary expense incurred in making repairs, and unavoidable detention. *Restitutio in integrum* is the leading maxim in such cases, say the court, and in respect to materials for repairs where repairs are practicable there shall not, as in insurance cases, be any deduction for new materials in place of old, for this reason that "the claim of the injured party arises by reason of the wrongful act of the party by whom the damage was occasioned, and the measure of the indemnity is not limited by any contract, but is coextensive with the amount of damage . . . Allowance for freight is made in such a case reckoning the gross freight less the charges which would necessarily have been incurred in earning the same, and which were saved to the owner by the accident, together with interest on the same from the date of the probable termination of the voyage."

In case of capture the general rule is that the neutral carrier of enemy's property is entitled to his freight (Story, J., in the *Comerceen*, 1 Gallison, 264). Sir William Scott held very firmly by this rule in the case of *Der Mohr* (3 C. Rob. 129, and 4 C. Rob. 315), a case of great hardship, appealing strongly to the sympathy of the court. In that case he said:

"In an unfortunate case like the present, the court would certainly be disposed to give the captor all possible relief. I need not add that no relief is possible which can not be given consistently with the justice due to the claimant. The demand of freight is, I apprehend, an absolute demand, in cases where the ship is pronounced to be innocently employed. . . . The freight is as much a part of the loss as the ship, for he (the captor) was bound to answer equally for both. The captor has, by taking possession of the whole cargo, deprived the claimant of the fund to which his security was fixed. He was bound to bring in that cargo subject to the demand for freight. He was just as answerable for the freight of the voyage as for the ship which was to earn it, or which was rather to be considered as having already earned it. In the room of this fund the captor has substituted his own personal responsibility, for loss accrues by the fault of his agent. I see no distinction under which I can pronounce that the claimant is not as much entitled to the freight as to the vessel." (See also 1 Gallison, 274, the *Anna Green*.)

Upon an open insurance policy gross freight is recoverable (2 Phillips

Ins., § 1238). As to insurance, the inchoate right to freight vests directly "the ship has broken ground on the voyage described in the charter-party" and there is an insurable interest "where there is an expectancy coupled with a present existing title" (*Lucena v. Crawford*, 2 Bos. Pull. N. R., 269; 1 Phillips Ins., § 334, p. 192).

Freight, then, is property insurable and collectible. It has value although the right as against the freighter may be inchoate until delivery. As to the freighter the ship-owner is without redress, unless there be delivery in accordance with the contract, but as to an insurer or a tort-feasor, there is a right to redress upon the happening of an interruption of the voyage. The amount of that redress and the method of computing it in the cases now submitted to us of illegal capture are now to be decided. The ship-owner has a right to a reasonable return upon his investment, for the risk to which his property is subjected, for its depreciation while engaged in the undertaking, and for the expenses to which he is subjected in carrying it out. The measure of that return, based upon the theory of a completed voyage, he has himself fixed in his contract of affreightment. If his voyage be not completed, but be interrupted and his property lost by the act of a wrong-doer, then, as against that wrong-doer, the maxim *restitutio in integrum* applies. If the voyage were completed the difficulty would not be serious, for as a guide we should have a contract made by parties opposed in interest and familiar with the business. As the voyage has not been completed, an allowance of gross freight would be more than a *restitutio in integrum*, and would neglect a deduction for expenses necessarily to be incurred in completing the contract and in conveying the cargo to the point of delivery. To allow gross freight under these circumstances would in effect not merely reimburse the owner, but render the seizure a matter of profit to him, and we do not understand that punitive damages should be recovered in the cases now before us. The vessel having been destroyed before the completion of the voyage, has not been so long employed as the contract contemplated, her crew have received less wages, and her hull and outfit have received less deterioration. She has only earned freight *pro tanto*. On the other hand, the expenses of freight earning are much greater at the beginning of the voyage than at any other period, for then advances are made seamen, stores are shipped, port charges and the cost of loading have to be met. Therefore, to divide the total freight by the number of days out of port would not be fair to the ship-owner; to deduct from the total freight the cost of the voyage from the place of destruction to port of destination would be a fairer rule, could those expenses be ascertained.

To compute the amount of this freight in each instance is practically impossible, so that the court is forced to the adoption of some general rule which in our opinion is fair in result. The difficulty is not a novel one, and the method of solution not without precedent. Those familiar with the proceedings of prize courts know that a substantially arbitrary

rule is there often adopted in practice to enforce justice, and now, nearly a hundred years after the events from which these claims arise, when all witnesses are dead and many records destroyed, we are forced to this course, as it is evidently impossible to estimate in every instance precisely the proportion of freight earned. Where such an estimate can be made we shall make it, in other cases we shall adopt a general rule.

In seeking for such a rule, we learn that in commercial cities, in the adjustment of average losses, there is a practice to award arbitrarily two-thirds of the full freight on the immediate voyage. This course was in effect followed by the commissioners under the treaty of 1831 with France, who made a similar allowance as a fair measure of the increase in value of the cargo by reason of the distance to which it had been transported at the time of capture; and the award was made to the shipper if he had paid freight; to the ship-owner if the freight had not been paid.

After carefully examining the cases before us we conclude that this rule is substantially just, and we adopt it.

This brings us to another point. The *Nancy* was under charter for a round voyage—Baltimore to Jamaica and return. She was destroyed on the outward voyage. Is she entitled to an allowance for freight based upon the entire contract contained in the charter-party?

As against an insurer or tort-feasor the inchoate right to freight vests when the vessel breaks ground "on the voyage described in the charter-party" (*supra*). An insurable interest in freight can not spring from a mere "expectancy" but may spring from an "expectancy" when this is coupled with "a present existing title." (*Lucena v. Crawford, supra.*)

In cases of general average for jettison, Lowndes states the rule to be that "when a ship is chartered to fetch or carry a cargo belonging to the charterer, the freight under the charter must contribute to the general average, whether or not the cargo is on board the ship at the time of the general average act, since the loss of the chartered ship, whether laden or not, would deprive the ship-owner of his expected freight." (Lowndes on General Average, 236.)

It has been held in this country that where a gross sum was to be paid as freight for a voyage out and return, the principal object of the voyage being to obtain a return cargo, the freight for the whole trip must contribute to general average on the outward voyage. (*The Mary*, 1 Sprague's Decisions, 17.) The same rule has been adopted in cases of salvage. (*The Nathaniel Hooper*, 3 Sumner, 542; *The Progress*, Edwards, 210; *The Dorothy Foster*, 6 C. Rob. 88; see also *Livingston v. Columbia Insurance Company*, 3 Johns. N. Y. 49; *Hart v. Delaware Insurance Company*, 2 Wash. C. C. 346.)

The decisions on this question in the United States do not go so far as those in England, but we lean to the doctrine of Sir William Scott and Dr. Lushington, as better applicable to the cases now before us, that when a vessel is actually under contract for a voyage from one port to another, thence to proceed to a third, she has such "a present

existing title" in the freight money of the entire voyage as to authorize a recovery based upon the total freight money for the round trip.

Of course she is not entitled to gross freight, and we must not be understood as intending any application of this principle to a vessel proceeding under a mere "expectancy" of finding cargo at her first port of call. The principle only covers those cases where there is an assurance of freight from her first port of call to her second, and a price stipulated to be paid therefor.

Again, in the case of the Ship *Tom*, 39 C. Cls. 290, 296, the court said:

At that day, when there was no telegraphic communication, and mail communication between England and America ordinarily involved months, merchants were in the habit of shipping their goods for a market. Ordinarily in such cases the shipper paid freight and charges, though a consignee was designated. Occasionally, and very rarely, an invoice or bill of lading notifies the master of the vessel that freight and charges are to be paid by the consignee

The court has been careful in the application of this rule to confine the allowance to the actual damage sustained by the ship-owner and not to make it a source of profit.

In the case of the Brig *Sally*, 41 C. Cls. 431, 437, the court made an actual computation of the freight based on the exact amount of cargo carried which appeared in that case:

Claimants contend that freight should be paid on the gross tonnage of the vessel. The proof shows the amount of cargo actually carried, which is less than the gross tonnage. Two-thirds freight allowance on tonnage is an arbitrary rule adopted from the rule in commercial cities in the adjustment of average losses. This court has said, in discussing the claims for gross freight, that it must not be understood as intending any application of this principle to a vessel proceeding under a mere "expectancy" of finding cargo at her first port of call (*Schooner John*, 22 C. Cls. R. 408, 463). With proof showing the amount of cargo carried, we are of opinion that the actual freight must be computed on the amount carried and not on the vessel's tonnage. The findings show the result to be an allowance to claimants whose proof entitles them to recover of one-half the value of the freight earnings, which amount to \$706.46. The value of the cargo is fixed by the findings at \$14,118 and of the one-half interest in the vessel at \$2,800, in favor of the legal representatives of Adams, the surviving partner of the firm of Adams & Loring.

In the case of the Sloop *Hiram*, 45 C. Cls. 9, 12, 13, the court explained again the application of this rule, and repeated that the seizure was not to be made a matter of profit to the ship-owner:

In the case of *Hooper, administrator, v. United States* (22 C. Cls. 408), it was said that the shipowner had a right to a reasonable return on his investment for the risk to which his property was subjected and for its depreciation while engaged in the undertaking and for the expenses to which he is always subjected in carrying it out; that the measure of that return, based upon the theory of a completed voyage, is fixed by the owner himself in the contract of affreightment; where the voyage be not completed, but be interrupted and the property lost by the act of the wrongdoer, then, as against the wrongdoer, the maxim *restitutio in integrum* applies. But because the seizure ought not to be made a matter of profit to the shipowner (the vessel having been taken before the completion of the voyage) and because the amount of the freight in each case being practically impossible to determine, the court adopted a general rule — not without precedent — to award arbitrarily two-thirds of the full freight on the immediate voyage. In laying down this rule the court was careful to say that where an estimate could be made the court would make it.

In the most recent case on the subject, Brig *Hope*, 46 C. Cls. 211, 214, the court further made it clear that there must be proof that a cargo was actually being carried before freight earnings would be allowed.

As the bulk was on board ship — that is, a cargo of some kind was on board — freight earnings appear made out unless the decree be disproved. Under these circumstances freight earnings are allowable because of the definiteness of the decree that there was a cargo being carried. Estimating freight on the proven tonnage of the vessel the amount aggregates on a two-thirds basis for the round trip the amount shown in the findings.

In thus allowing freight earnings the court adheres to the rule that where actual freight can not be ascertained and consequently not computed for want of ascertainment, a two-thirds amount of full freight is allowable under the commercial rule adverted to and adopted in *Hooper's Case*, 22 C. Cls. 408.

These full quotations show the care with which the court has confined the allowance of freight to making good an actual loss sustained by either the owner or the shipper as a necessary consequence of the capture.

LOSSES OF INSURERS

At the date of these captures the business of marine insurance was carried on not only as to-day, by incorporated companies, but also by individual insurers. A single individual, however, rarely took the entire risk on the vessel or cargo. The business was done in the office of insurance agents, who wrote a policy for a certain amount, and at a certain rate of premium. This policy would be underwritten by a number of individual underwriters, each one of whom stated opposite his name the amount of the risk undertaken by him, and for which he received his proportionate share of the premium.

On the occurrence of a loss each underwriter paid the full amount underwritten by him, if the loss was total, or a proportionate percentage thereof in case of partial loss. On familiar principles the underwriters have been held to be in all cases subrogated to the rights of the insured.

The court said:¹⁸

When abandonment is made and the insurance paid the insurer stands in the place of the insured, and is entitled to all the advantages resulting from that situation, and this right relates back to the loss. (Park on Ins. 143; 1 Wash. C. C. 443; 12 Peters, 378; 1 Sumner, 328 and 400; Phillips on Ins., 1707; 2 Parsons on Mar. Ins. 194; 104 Mass. 107; 12 Pick. 348.)

"When a total loss has been paid there passes to the insurer not only what remains of the ship in a material form, but likewise all rights incident to the property of whatever kind. When a loss of any kind, whether total or partial, has been paid the insurer so far stands in the place of the assured that he is entitled to recover whatever compensation for the loss the assured may be able to recover from any third party." (Lowndes Mar. Ins. 223; Phillips on Ins., Secs. 1712 and 1723.)

The Supreme Court supports this doctrine, saying it is a mistake to assert that the right of a marine insurer to proceed against a carrier after payment of total loss "grows wholly or even principally out of any abandonment; payment of a total loss without abandonment being sufficient to vest in the insurer the rights of the insured" (*Hall and Long v. Railroad Co.*, 13 Wall. 367); while Phillips states the rule to be that "a mere payment of a loss, whether partial or total, gives the insurers an equitable title to what may be afterwards recovered from other parties on account of the loss. The effect of a payment of a loss is equivalent in this respect to that of an abandonment." (Section 1723.)

In capture and condemnation there can be no *spes recuperandi*, for

¹⁸ Schooner *Delight*, 21 C. Cls. 434, 438, 439.

the vessel, so far as the owners are concerned, has disappeared, and there exists no reasonable prospect that anything will at any time be recovered. "There is no existing hope," to use Chancellor Kent's language, "of recovery in this case (of capture), . . . and an abandonment . . . would have been as idle as if the property had perished at sea" (*Gracie v. The N. Y. Ins. Co.*, 8 Johnson, 245); and since the time of Lord Mansfield the capture of a neutral merchantman upon the high seas, especially when followed by confiscation, amounts to total loss and abandonment. (*Goss v. Withers*, 2 Burr. 683; 4 Cranch, 29; 4 Dallas, 421; 3 Wheat. 183; 1 Wash. C. C. 145; 3 Mass. 238.)

In the case of the *Vermont*, in which the opinion already cited was delivered by Chancellor Kent, the vessel had been captured, the capture declared illegal by the French tribunal; pending an appeal by the captors, the cargo was delivered to the consignee upon bond given by them larger in amount than the insurance. The appeal was heard and the vessel with her cargo condemned, whereupon the insured sued upon the policy after expressly refusing to abandon. The court, holding abandonment to be unnecessary, shows that any claim against the captors could only be prosecuted by the National Government, which, if compensation were obtained, would become trustee for the party having the equitable title to the reimbursement, and that this party is the insurance company, "if they should pay the amount of the bond;" that is, the insurer would be entitled to what he paid. This is in accordance with the general doctrine of insurance law laid down by Lord Cockburn in the following language:

"I take it to be clearly established in the case of a total loss, that whatever remains of the vessel in the shape of salvage, or whatever rights accrue to the owner of the thing insured and lost, they pass to the underwriter the moment he is called upon to satisfy the exigency of the policy, and he does satisfy it."

And again (p. 440):

In one New York case (*United Ins. Co. v. Scott*, 1 Johns. 106) the court held that right of ownership in a captured vessel passed to the underwriters upon abandonment and payment of total loss; in another similar case (*Robinson v. United Ins. Co.*, 1 Johns. 592), the insurers were sustained in their endeavor to bring trover against the owners for a cargo captured, abandoned, and paid for, while the case of *Gracie* held abandonment useless; and in the Chinese indemnity claims this court ruled (*Hubbell v. United States*, 15 C. Cls. R. 546) that underwriters who had paid losses sustained by reason of the capture and plunder of a vessel and cargo by Chinese pirates could participate in an indemnity fund paid therefor.

These rules have been adhered to in all subsequent decisions of the Court of Claims. Where the loss of a vessel or cargo was paid for by

insurers whether individual or corporate, the Court of Claims has allowed the amount of the insurance so paid.

Congress in its action on the conclusions of the Court of Claims has adopted a less liberal rule, and has made a distinction between individual and corporate insurers. The acts appropriating for the payment of these claims have contained a proviso,—

That any French Spoliation claim appropriated for in this act shall not be paid if held by assignment or owned by any insurance company.¹⁹

This proviso does not prevent the payment of claims of individual underwriters. All such claims have been recognized and paid in all acts appropriating for the payment of these claims, passed up to the present time.

BLOCKADE

Vessels bound to a blockaded port of one of the belligerents are liable to capture and condemnation with their entire cargo by the other belligerent. This ground for condemnation was taken in some of the French decrees of the time, and was insisted upon on behalf of the United States in some cases as a defense to the claims.

It was a rule of international law at that day as much as it is at the present time that a blockade to be binding must be effective, that is, sustained by sufficient force really to prevent ingress and egress of vessels.

Marshall, when Secretary of State, just before his appointment as Chief Justice, wrote our Minister to England in 1800 that it is "of the last importance to neutrals that this principle be maintained unimpaired."²⁰ He even contended that where a storm momentarily blew off the fleet and forced it from its station, the blockade was temporarily interrupted, and "that, during such temporary absence, the commerce to the neutrals to the place should be free."

The court on a careful examination of the history of the time has found that in view of the smallness and weakness of the French navy in comparison with the British at that date, there was no effective blockade of any of the possessions of Great Britain, and hence, that there could

¹⁹ 33 Statutes at Large, 800.

²⁰ Moore's Digest of International Law, Vol. 7, p. 789.

be no rightful condemnation of American vessels or cargoes on the ground of destination to a blockaded port.²¹

These captures, especially in the West Indies, where most of the claims arise, were made almost exclusively by privateers, of which the French Government commissioned a vast number, owing to the small number of vessels which the French Government herself possessed, to cope with the large and well appointed British navy. These privateers were built more for speed than for strength. Their object was to prey primarily upon merchantmen of their enemy, the British, and secondarily upon neutral commerce, including American.

On encountering a British man-of-war, these privateers invariably took to their heels, failing in which they proved a ready capture to the British vessel. Any attempt on their part to blockade a British port would have been as futile as the paper pretense of doing so would have been ridiculous.

CONTRABAND

At the time of the occurrence of these claims there was much confusion in the understanding and practice of nations as to what was contraband, as well as what was the consequence of the carriage of contraband, as regards the ship and the rest of the cargo.

The treaty of 1778 between the United States and France settled this question by making a very clear and definite list of goods which shall be regarded as contraband and those which shall not. It also declared that nothing but the contraband goods themselves shall be confiscated, and that the rest of the cargo, as well as the ship herself, shall be free from confiscation on account of the contraband goods.

Congress, however, by Act of July 7, 1798²² declared that on account of the repeated violation of the treaties by France, they should no longer be regarded as legally obligatory on the government or citizens of the United States. Up to the date of this Act the court has regarded all cases as governed by the terms of the treaty. After this date, however, the court has taken general principles of international law, as understood at the time, as the sole guide for the decision of cases.

²¹ Schooner *John*, 22 C. Cls. 408, 440-449.

²² 1 Statutes at Large, 578.

One of the questions most frequently arising has been in regard to horses. "Horses with their furniture" are expressly included by the treaty (Art. 24),²³ as within the description of contraband goods. The court has held that in general horses must be regarded as contraband even after the abrogation of the treaty, as well as while it was in force.²⁴

On the other hand, in a case where after the abrogation of the treaty five horses constituting a small proportion of the cargo were carried by a vessel, they could not be regarded as contraband.²⁵

On the question whether contraband articles "infect," as the expression is used, other articles also, the court has inclined to the view, as the one prevailing at the date of these grievances, that contraband infects other articles belonging to the same owner, as well as the ship herself, provided she belongs to the same owner as the contraband goods.²⁶

This view, however, would not apply to cases arising previously to July, 1798, while the treaty was in force, as that treaty expressly exempts from all penalties of contraband all other property than the contraband itself, whether belonging to the same or a different owner.²⁷

LAND SEIZURES

Although the terms of the jurisdictional Act are broad enough to embrace all captures made under authority of the French Government, whether on land or sea, it has been decided that it was the intent of the Act to confine the jurisdiction of the Court of Claims to captures made at sea. The court therefore disallowed a claim for American property seized by authority of the French Government in 1796 on Italian soil.²⁸

RESISTANCE TO SEARCH

It is a well recognized rule of international law that in time of war a belligerent cruiser or privateer is empowered to visit and search any

²³ Public Treaties of the United States, 1875, p. 210.

²⁴ Schooner *Atlantic*, 37 C. Cls. 17; Brig *Lucy*, 37 C. Cls. 97.

²⁵ Brig *Juno*, 38 C. Cls. 465.

²⁶ Schooner *Bird*, 38 C. Cls. 228.

²⁷ Public Treaties of the United States, 1875, Treaty of 1778 with France, Art. 13, p. 207.

²⁸ *The Leghorn Seizures*, 27 C. Cls. 224.

merchant vessel encountered on the high seas for the purpose of ascertaining whether the ship and her cargo are belligerent or neutral, as well as whether she is committing any offense against international law, which might render her liable to capture, such as carrying contraband, or sailing to a blockaded port.

The exercise of this right on the part of the belligerent implies a corresponding duty on the part of the neutral merchantman to submit peaceably to the visitation and search of the belligerent.

The violations and disregard of neutral rights, which characterized the conduct of the French cruisers and privateers during this period, were such as to cause Congress to pass several Acts, modifying, so far as it was competent for Congress to do so, this established rule of international law.

With this view, Congress, by Act of June 25, 1798,²⁹ authorized "the commander and crew of any merchant vessel of the United States" to "oppose and defend against any search, restraint or seizure, which shall be attempted" "under the authority of the French Republic."

The Court of Claims, in numerous decisions, has held that while the mere fact of an American merchant vessel carrying an armament under the provisions of this Act did not render her lawfully liable to capture by French cruisers, yet resistance to search rendered her liable to capture by the French vessel, and invalidates any claim which might otherwise be preferred under the Act of 1885.³⁰

It seems hard that a vessel of the United States should be held to be acting in violation of international law for doing only what the laws of the United States permitted her to do. Yet the view of the court was that, whatever be the domestic laws of the United States, a claim could not arise against France if the conduct of the captured vessel amounted to a violation of international law, and that if such a claim could not arise against France it cannot against the United States, who assumed only the liability of France.

²⁹ 1 Statutes at Large, 572.

³⁰ *Schooner Industry*, 22 C. Cls. 1, 37; *Schooner John*, 22 C. Cls. 408, 426-440; *Schooner Nancy*, 27 C. Cls. 99; *Ship Rose*, 36 C. Cls. 290; *Ship Amazon*, 36 C. Cls. 378; *Schooner John*, 37 C. Cls. 24; *Schooner Mary*, 37 C. Cls. 33; *Schooner Endeavor*, 44 C. Cls. 242.

RIGHT OF DEFENSE BEFORE CONDEMNATION

In a number of cases brought before the Court of Claims, it appeared that the conduct of the captors was such as to prevent the master of the captured vessels from appearing before the tribunal or from interposing any defense to the proceedings to condemn the vessel and cargo. These acts of violence, preventing any effective defense against the proceedings of the captors, have been of various kinds.

In one case ³¹ these facts appear:

On arriving at the port of Basse Terre the master and crew of the vessel were imprisoned until after the condemnation of the vessel, when they were put on board a vessel carrying a flag of truce, which conveyed them to the island of St. Christopher. By the action of the French authorities the master and owners of the vessel and cargo were prevented from appearing before the prize court and of defending the rights of the owners against the claim of the captors; and it does not appear that the master or the owners were in any way represented before said prize court or given an opportunity to be heard.

In another ³² the officers and crew were taken off of the captured vessel and she was taken to Guadeloupe by a prize crew. When the privateer with the captured officers and crew on board got to Guadeloupe they found the vessel and her cargo already condemned and sold. Some part of the crew were put in prison. Others got liberty to work.

In another ³³ these facts appear:

The *Thetis* was then ordered to Port au Paix, where the privateer belonged; that the captured vessel sailed in company with the privateer and a brig until spoken by a Spanish frigate, when the privateer left them; that they proceeded on the voyage, but came to anchor in company with the brig in the bay of Monte Christe, where the prize master obtained a pilot and proceeded to Fort Dauphin; from thence the master went to Cape François to put in a claim for the vessel and cargo, being the only officer left on board the *Thetis*; and thereupon the mate applied to the American consul at the cape for relief, and in company with the consul waited upon the French administration, but neither were permitted to see the authorities; thereupon they sent a petition in writing

³¹ Schooner *Good Intent*, 36 C. Cls. 262.

³² Brig *Sally*, 37 C. Cls. 74.

³³ *Snow Thetis*, 37 C. Cls. 470, 471.

to the administration, but obtained no answer, and afterwards the prize master disclosed to the mate the condemnation of the vessel and the cargo.

In still another ³⁴ it was found:

The sloop *Townsend*, Daniel Campbell, master, sailed on a commercial voyage August 28, 1798, from Boothbay, Massachusetts (now Maine), bound for the English island of Antigua. While peacefully pursuing said voyage she was seized on the high seas, about the 1st of October, 1798, by the French privateer *Le Pelletier* and carried to the island of Guadeloupe, and her master was thrown into prison, with the loss of all his sea clothes, books, and papers, where he remained for a period of about three months. He was examined in preparatory on the 10th day of October, 1798, while in prison, in which it was shown that the cargo consisted of boards, staves, shingles, and codfish.

She was there condemned by the Tribunal of Commerce and Prizes, sitting at Basse Terre, on said island, and condemned on the ground of a want of *rôle d'équipage* and an invoice of the cargo, whereby the same became a total loss to the owners.

Again, in the case of the Brig *Resolution*,³⁵ it appeared, —

That the master and crew were imprisoned at Pointe à Pitre and were held as prisoners of war, and that the master was not given an opportunity to be heard by the court.

In the case of the Schooner *Rebecca*,³⁶ it was found:

Second capture. — Said Schooner *Rebecca* again sailed from Baltimore, August 30, 1796, under the command of Capt. John Hall, bound for St. Thomas and St. Bartholomew. On the 4th of October, 1796, while making her course for St. Bartholomew, she was visited and boarded by the French schooner of the Republic, *L'Hirondelle* (*The Swallow*), Captain Caneray, of Guadeloupe, who, having examined all her papers and found them in the most perfect regularity, allowed the *Rebecca* to continue her course. The next day the *Rebecca* was again boarded, this time by a French privateer called the *Passe Partout*, Capt. Lange Doucet. This vessel captured her and first conducted her to the French island of St. Martin, with her officers and crew on board. At that place they took the captain and supercargo off their vessel and transferred them to a French pirogue, in which they were taken to Basse Terre,

³⁴ Sloop *Townsend*, 42 C. Cls. 134, 136.

³⁵ No. 3278, H. Doc. 89, 58 Cong., 2 Sess.

³⁶ H. Doc. 1382, 60 Cong., 2 Sess.

Guadeloupe. They arrived at that port on the 14th of October, 1796, and were there placed in prison.

On the voyage from St. Martin to Guadeloupe the captain and supercargo were kept in irons, fed only on bread without water, and kept on deck exposed to the sun and rain as well as to the sea washing over the vessel. On arrival at Guadeloupe the supercargo was put in prison and the captain not allowed to communicate with him. The vessel and cargo were condemned by decree of a court sitting at Pointe à Pitre in the absence of the captain and supercargo, and no knowledge was had by them of the proceedings or decree until it was shown to Captain Hall by the secretary of Victor Hugues, then governor of Guadeloupe.

The condemnation was on the sole ground that the supercargo, Leon Haraneder, was a Frenchman by birth and had become naturalized in the United States, and that it appeared by his certificate of naturalization, which was taken from his possession and was examined by the prize court, that he renounced all allegiance and fidelity to all powers whatever and particularly to the French Republic, and that he was therefore an enemy of the French Republic, and being such enemy the schooner was good prize.

In the case of the Schooner *Juno*,³⁷ William Burgess, Master, the captain "was treated like a dog by the French" and "was abused because he refused to let the French have his cargo at the price they offered him," and finally died.

In all these cases the court acted upon the rule laid down by Sir William Scott, afterwards Lord Stowell, in the English admiralty (as quoted 42 C. Cls. 150, 151):

Before the ship or goods can be disposed of by the captor there must be a regular judicial proceeding, *wherein both parties may be heard*, and condemnation thereupon as prize in a court of admiralty, judging by the law of nations and treaties.

Such violent proceedings on the part of the nation with whom we were on terms of peace excite indignation, even at the present day, and more than justify the conclusion of the court arrived at in all of them, that proceedings so violative of every rule of international law, and, indeed, every principle of justice, must be held to give rise to a valid claim primarily against the French Government, and ultimately against the United States who assumed the liabilities of France.

Wherever the master or crew have been prevented by imprisonment

³⁷ H. Doc. 362, 60 Cong., 1 Sess.

or by enforced absence from the place of trial from making a proper presentation of their case before the French tribunal acting in prize, the condemnation is thereby invalidated.

In case of the Schooner *Maria*, 39 C. Cls. 147, the court held:

It was the right of the master to be present at the trial before the prize court to defend the owners; and where he was prevented by imprisonment from so doing the proceeding was *ex parte* and wholly void.

The opinion in the case of the Sloop *Townsend*,³⁸ thus sums up the rule: "A prize proceeding is no exception to the universal principle of justice which requires a proper legal hearing before condemnation can be ordered."

PERSONAL INJURIES

The descriptive terms of the jurisdictional Act of 1885 are "illegal captures, detentions, seizures, condemnations, and confiscations." On their face these terms seem broad enough to embrace injury to the person, as well as to property. This view would have special force in view of the many indignities and personal injuries which, as we have just seen, were inflicted upon the helpless American captains and their crews.

Yet, just as we have seen that, although the terms of the Act are broad enough to include land captures, they have been limited to captures at sea; so by parity of reasoning the court has concluded that claims for the capture, detention and confiscation of property alone were intended to be covered by the terms of the Act. It has therefore disallowed all claims based upon personal injuries.³⁹

The concluding article in the next number of the JOURNAL will deal with certain rules of exclusion of claims adopted by the court, as well as with the rules adopted by legislation and judicial decision, for assuring that the money allowed shall pass into the hands of the actual living next of kin of the original sufferer by French spoliations.

GEORGE A. KING.

³⁸ 42 C. Cls. 134, 151.

³⁹ Brigs *Fanny and Hope*, 46 C. Cls. 214.

CAPTURE AFTER CAPITULATION: A JURISTIC ANACHRONISM

One of the earliest mitigations of the horrors of war, particularly in its incidence upon private individuals, was the custom of sparing the inhabitants of a surrendered city in their persons and property, instead of subjecting them to the rapine and pillage which usually followed a capture by storm. Even the Mosaic Code made this exception in the midst of its barbarities, although the doomed cities of Canaan were excluded from the benefits of the exception. Both the general savagery and the one humane departure from it are well exemplified by verses ten to sixteen of the twentieth chapter of Deuteronomy:

10. When thou comest nigh unto a city to fight against it, then proclaim peace unto it.

11. And it shall be, if it make thee answer of peace, and open unto thee, then it shall be, that all the people that is found therein shall be tributaries unto thee, and they shall serve thee.

12. And if it will make no peace with thee, but will make war against thee, then thou shalt besiege it.

13. And when the LORD thy God hath delivered it into thine hands, thou shalt smite every male thereof with the edge of the sword;

14. But the women, and the little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou take unto thyself; and thou shalt eat the spoil of thine enemies, which the LORD thy God hath given thee.

15. Thus shalt thou do unto all the cities which are very far off from thee, which are not of the cities of these nations.

16. But of the cities of these people, which the LORD thy God doth give thee for an inheritance, thou shalt save alive nothing that breatheth.

This distinction between the penalties of resistance and the immunities of surrender has been generally recognized throughout the ages. The previous learning on the subject was summed up by the learned Grotius in his monumental work on War and Peace. He declared to its fullest extent the general right of capture, even to the extent of pillage, and defended it as a legitimate method of warfare. He also declared, in the

strongest terms, the absolute right of the conqueror over the persons and property of the conquered, but he recognized a surrender or capitulation as constituting an exception to this general rule of ruthlessness, and, in commenting upon its effects, he said:

But the conqueror, that he may do nothing unjustly, ought first to take care that no man be killed unless for some capital crime; so also that no man's goods be taken away unless by way of just punishment. (Grotius, *De Jure Belli et Pacis*, Book 3, Chap. 20, Art. L. 1.)

In this country the same rule was laid down by the courts in the earliest cases and was declared by Chancellor Kent in his Commentaries as follows:

The general usage now is not to touch private property upon land without making compensation, unless in special cases dictated by the necessary operations of war, or when captured in places carried by storm, and which repelled all overtures for a capitulation. (14th Ed., Vol. 1, p. 92.)

In the case of *The Resolution* (2 Dallas, 1), the earliest Federal Court of Appeal decided that a capitulation rendered the property of the capitulants exempt from capture, and the same doctrine was recognized throughout the Civil War. (See *The Venice*, 2 Wall. 258, and subsequent cases.)

One case, in which the court took a somewhat narrow view as to the date upon which immunity from capture attached (*The Circassian*, 2 Wall. 135), was subsequently examined by an international tribunal, which reached a different conclusion and held that the enemy character of rebel territory ceased for international purposes as soon as it was actually occupied by the Federal forces (Am. & Brit. Claims Commission, Moore's Int. Arbs., Vol. 4, pp. 3911-3920), thus in effect sustaining Mr. Justice Nelson's dissenting opinion. (2 Wall. 155.)

The great English admiralty lawyer, Sir William Scott, afterwards Lord Stowell, took the same view in the case of the *Ships taken at Genoa*, 4 Rob. Adm. Reps. 388. The question there arose concerning certain shipping seized in the harbor of Genoa, at about the time of the capitulation of the city. The court held that if the shipping was seized before the capitulation, it could be held by the captors for condemnation

or ransom, but if the seizure was made after that time, it would be considered not as an exercise of any rights of war, but as "mere lawless rapine and plunder."

All the principal modern European authors concur in this doctrine, which is simply a corollary of the general rule that when any territory passes within the firm possession and occupation of a foreign Power, the duty of protection is co-extensive with the power of control. Personal liberty and security can be interfered with by the occupying Power only for just cause, and private property, while subject to military requisition in case of necessity, must be paid for, if taken. The payment, it is true, may be in cash or by voucher and the ultimate liability to honor the voucher may be a question to be adjusted on the conclusion of peace. But whatever the method, the underlying principle is the same, and the taking is recognized as in the nature of an act of eminent domain, not an act of war. (See *United States v. Russell*, 13 Wall. 623; *Les Requisitions Militaires du Temps de Guerre*, by Ch. Pont, Brevet Captain of Infantry and Doctor of Law, pp. 85-86; Latifi's *Effect of War on Property*, London, 1909, p. 30; Bernier, *De l'Occupation Militaire*, p. 108; Holland's *Law of War on Land*, London, 1908, Arts. 92, 102, 106, 112, 113, quoting from and commenting on Arts. 25, 42, 46, 52 and 53 of the Hague Regulations of 1907). *A fortiori* should this rule apply when the occupation is the result of a voluntary submission to the invader.

It has remained for the Supreme Court of the United States to place this country in opposition to this otherwise apparently universal doctrine. Among the by-products of the Spanish War has been a very considerable addition to the judicial declarations by that tribunal upon questions of international law. One of the most remarkable of these declarations is contained in two cases very recently decided upon appeal from the Court of Claims — *Herrera v. United States*, 222 U. S. 558, and *Diaz v. United States*, 222 U. S. 574, — in which the court held that private property was still subject to capture as an act of war after the formal capitulation of the city in which such property was situated. While it is of course true that the decisions of a national court can not make international law, they nevertheless constitute a most important source for ascertaining that nation's interpretation and application of the rules

of international law. These decisions appear to constitute so striking an exception to the generally received doctrine on this subject as to call for some special comment and discussion.

The facts involved were very briefly these:

After the great naval victory at Santiago, negotiations were immediately instituted for the capitulation of that city. These negotiations extended over a period of more than ten days, beginning on July 4, 1898. On July 13, 1898, when the terms had been substantially arranged, the President of the United States issued General Order No. 101, which was made in express contemplation of the capitulation. It declared and adopted the prevailing rule of international law as follows:

Private property whether belonging to individuals or corporations is to be respected and can be confiscated only for cause. * * * Private property taken for the use of the army is to be paid for when possible in cash at a fair valuation, and when payment in cash is not possible, receipts are to be given.

On July 16, 1898, the formal articles of capitulation were signed. They provided among other things that the officers and men of the Spanish forces should retain their private property. On July 17, 1898, the American forces entered and took possession of Santiago. They found there and took possession of a vessel, the *San Juan*, belonging to the claimants in the Herrera Case; another vessel, the *Thomas Brooks*, certain smaller vessels and lighters, and certain wharves, belonging to the claimants in the Diaz Case. The two larger vessels were used for military purposes for a considerable time, and were finally returned to the owners, no compensation being paid for their use. A claim therefor was rejected by the War Department on the ground that it was unliquidated. The smaller vessels and lighters were eventually returned and compensation for their use was agreed upon and paid. An offer of compensation was made for the use of the wharves, but no agreement was ever reached as to its amount, and no payment was made. Suits were then instituted in the Court of Claims, and judgments were given against the claimants, on the express ground that the taking of the vessels and wharves was a capture as an act of war, involving no liability for compensation. Other questions of jurisdiction and procedure were involved, but as these have no international significance they will

not be here discussed. On appeal to the Supreme Court, the judgments of the Court of Claims were affirmed, and the Supreme Court held squarely that the seizure must be regarded as "an exertion of the war power," and rejected "the view contended for by claimants that with the surrender of Santiago, and the cessation of active operations in the Santiago District, enemy property lost such character and was not subject to such right of capture." (222 U. S. at p. 572.) The court further held that it was "not possible to hold that the proclamation of the President was intended to supersede the laws of war and attach to every appropriation by the military officers conducting operations of war the obligations and remedies of contracts. It could not have been the intention of the President to prevent the seizure of property when necessary for military uses, or to prevent its confiscation or destruction." (222 U. S. at p. 578). The court declared that there was a distinction between "military seizure as booty of war," and "seizure for immediate use of the army" and held that the latter was a right that could be exercised even after a capitulation and without any liability for compensation. The United States thus stand committed through their highest court to the doctrine that after a capitulation the non-combatant inhabitants of the capitulated territory, while immune from mere indiscriminate plunder for the sake of gain, may lawfully be deprived of their private property for the use of the army without compensation. If this can be done in the case of vessels and wharves, there seems no reason why it may not also be done in the case of private residences, and supplies of all kinds. Undoubtedly private property in occupied territory is subject to military requisition for the necessities of the occupying force, but to allow this right to be exercised without liability for compensation seems wholly inconsistent with modern civilized usage. It is also inconsistent with logic. The seizure is recognized as constituting an act of war. The capitulation is necessarily an agreement for the cessation of war in a particular locality. It is equally difficult to find any legal, any logical or any moral justification for the occupying forces to continue to wage war in this manner upon the private non-combatant inhabitants of a city or district which has expressly submitted to their power and put itself under their protection.

The "necessities" of the army do not justify confiscation. Necessity

is a dangerously elastic term; it is the "mother of invention" of sophistical excuses, and it may be stretched to cover more sins than charity. Doubtless to the lusty men at arms of the mediæval *condottieri*, the shrieking women of a captured town seemed just as "necessary" as did the *San Juan* and the *Thomas Brooks* to the American quartermasters. Capitulation, which protected the first in the darkness of the Middle Ages, should not be shorn of its efficacy to protect the second in these latter days of supposed enlightenment and humanity.

The court's declaration that the President's instructions could not operate to "supersede the laws of war" seems to indicate a misapprehension on the part of the court as to what the laws of war on the subject actually are, and thus to emphasize the importance of having the modern civilized usages in this respect expressly adopted by the United States by executive regulation, statute or treaties, as may be practicable and convenient.

The court's decision was largely based upon two recent decisions in other cases arising out of the Spanish War, *Hijo v. United States*, 194 U. S. 315, and *Juragua Iron Co. v. United States*, 212 U. S. 297. In the *Hijo* Case, however, the seizure of the vessel there in question was actually a capture as an act of war, and as an incident to the capture of the city and port of Ponce in Porto Rico. There was no capitulation of Ponce, and no executive instructions in regard to the immunity of its inhabitants. There was on the contrary a military demonstration in force, as a result of which the Spanish troops were compelled to evacuate the city, and the seizure of the vessel was thus a mere incident to hostile military operations forming part of an active campaign against an armed enemy actually in the field.

It is immaterial that the Porto Rican campaign involved a maximum of conquest with a minimum of carnage; the military operations were none the less an actual waging of war, with all its legal, if not all its physical, incidents. In the *Herrera* Case the Supreme Court took into consideration the distinction contended for by the claimants between the capture of Porto Rico and the capitulation of Santiago, but held in express terms that this did not give any greater immunities in this respect to the inhabitants of the capitulated district.

In the *Juragua Iron Company* Case the act complained of was the

destruction on July 11, 1898, of claimants' property in the Santiago District as a military measure to prevent the spread of pestilence. This was during actual hostilities, before the capitulation, and before the President's proclamation. It thus came within the same distinction which the court brushed aside in respect to the Hijo Case. It was also distinguishable on other grounds. The destruction of property as an incident to military operations, as distinguished from its taking for the use of the army, has almost never been held to involve any liability, whether the destruction is of enemy or friendly property. It makes no difference whether the destruction is incident to a bombardment, to the construction of fortifications, or to the enforcement of sanitary measures. In any of these cases, the individual loss or damage is merely incidental to the accomplishment of a greater public purpose. In many cases, the loss or damage is inevitable if the result is to be attained at all, and it is usually impracticable to estimate its amount or justly to apportion and award compensation. This would be particularly true in the case of damage incident to a bombardment. Moreover, independent of the laws of war, or of the existence of hostilities, there exists a common-law right of summary destruction in the case of any great emergency which can be met in no other way. This doctrine was very clearly laid down as early as Coke's Reports thus:

"And for the commonwealth a man shall suffer damage, as for saving of a city or town a house shall be plucked down if the next to a fire; and the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action, as it is said in 3 H. 8, fol. 15. And in this case the rule is true; *Princeps et respublica ex justa causa possunt rem meam auferre.*" The Case of the King's Prerogative in Saltpetre, 12 Rep. 12."

And thus:

"Everyone ought to bear his loss for the safeguard and life of a man; for *interest rei publicæ quod homines conservantur*, 8 Ed. 4, 23, &c., 12 H. 8, 15, 28 H. 8, Dyer, 36, plucking down of a house, in time of fire, &c., and this *pro bono publico; et conservatio vitæ hominis est bonum publicum.*

This last expression was used in a case of loss where merchandise was cast overboard to lighten the barge in a tempest for the safety of the

lives of the passengers and it was held that the ferryman was not liable unless the barge was overloaded through his fault. *Mouse's Case*, 12 Rep. 63. (And see *Bowditch v. Boston*, 101 U. S. 16.)

The destruction of property complained of in the *Juragua Case* might, therefore, have been justified even in a time of profound peace, and the decision in that case seems a wholly inadequate basis for a reversion to mediæval methods of confiscation of private property for reasons of mere administrative thrift.

The Civil War cases, such as *The Venice*, *supra*, were distinguished on the ground that they involved the *re-establishment* of national authority over territory from which it had been temporarily displaced by rebellion, and not the *extension* of national authority over hostile foreign territory. This argument really tends in the other direction. All the inhabitants of territory in rebellion might well be considered as infected with treason and subject to punishment in their persons and confiscation of their goods. But the peaceful private citizens of a foreign country have committed no crime against an invader, and when, through the voluntary action of their official defenders, they are peacefully turned over to the undisputed control of the invader, he surely owes them the fullest protection in their persons and property, since there is no one else who can protect them at all. Moreover, the Supreme Court had held in the Civil War cases themselves, that rebel territory was enemy territory, and that the rules of *international* law applied to the effects of its military occupation. (*Coleman v. Tennessee*, 97 U. S. 515.)

The whole modern development of the laws of war has been in the direction of greater immunity in person and property for all non-combatants at all times. The civilized view of war is that it is an affair of governments, acting through and against officially organized forces, and that the peaceful private citizens of both countries should be as little disturbed as possible. Whether or not this is wise may be a debatable question; possibly the more obnoxious war can be made to those unofficially affected, as well as to those officially engaged in it, the sooner it may be eliminated as an unnecessary evil. But this does not seem to be the trend of history. It is more and more generally recognized that only the regular armed forces should fight, that only government property should be captured, and that the private citizen should suffer only

through increased taxation. Naval prize is an exception, but it is recognized as such, and its scope is more and more limited by international conventions. It can hardly be supposed that the United States Supreme Court intended to start this country in a direction counter to the general civilized current, and it is to be hoped that in some practicable and appropriate method the modern view of the immunities incident to a capitulation may be officially recognized and adopted by this nation.

HOWARD THAYER KINGSBURY.

BULGARIAN INDEPENDENCE *

PUBLIC DOMAIN. VAKOUFS AND TEVLIETS

[Being the fifth part of a series of Studies on the Eastern Question. The preceding parts appeared in the January, April and July numbers of the Journal for 1911, and the January number for 1912.]

From the foregoing explanations, it will be seen that in the Turko-Bulgarian arrangement relative to the question of independence, less care was taken in regulating according to juridical principles the transmission of the attributes of sovereignty than in an effort to reach a financial compromise capable of conciliating opposing interests. We have in particular considered the property of the public domain as a real property for which the emancipated State must refund the accumulated outlay. This is a curious idea for our times, when we have lost the habit of looking at the public power in the light of patrimoniality. But this conception is self-explanatory, if we but remember that we are in the Orient, in Turkish territory where the coining of the attributes of sovereignty has always been the rule, where the principles of the Middle Ages have survived longer than anywhere else. And these conditions are self-explaining if we think of the persisting uncertainty of the nature and the real meaning both of the Treaty of Berlin and of the union of 1885 regarding Bulgaria and Rumelia. From all these conditions, there issues an impression of indecision and of archaism.

This impression is further accentuated by Art. 3 of the protocol of St. Petersburg:

The sum of 5 million Turkish pounds * * * due to the Imperial Ottoman Government represents * * * for another 40 million the 310 kilometers of Eastern Railways situated in Eastern Rumelia and seized by the Bulgarian Government * * * and for forty-three million francs the equivalent in value for the properties of the domain of the Ottoman state, situated in Eastern Rumelia and in Bulgaria.

* Translated from the French by courtesy of Dr. Theodore Henckels of Washington, D. C.

What does all this refer to? Properties of the private domain of the Turkish State left in possession of the Bulgarian State? Search for them would be in vain, particularly in the Northern Balkans. Does it refer to the properties of the public domain? Turkey in that case would be reimbursable for the construction of highways, canals, public works of every description she might have built before the Treaty of Berlin. Can it be meant to illustrate in the extreme the development of the patrimonial conception of the public domain? In reality, these dispositions in disguised form dispose for a certain sum of money of the rights which the Sultan thought he still had over the two Bulgarias, another patrimonial conception of the rights of sovereignty and of suzerainty, but especially a political transaction stripped of all juridical meaning.¹

Vakoufs and Tevliets. — A last question is that relating to "*vakoufs*," to which we referred incidentally in connection with the religious situation. "*Vakoufs*" ordinarily means religious Mussulman establishments; but there were several kinds of *vakoufs*, and some had a social and economic aim rather than a religious one. Sometimes they comprise another institution of feudal origin, called "*tevliets*" or "*vakoufs mustesna*," in which the religious feature is only accessory. Moreover, they are not public, but private establishments.

According to the terms of Article XII of the Treaty of Berlin, a Turko-Bulgarian Commission, within two years' time was to settle all matters regarding the manner of transferring or operating on behalf of the Sublime Porte the property of the State and of religious establishments (*vakoufs*), as well as all matters relating to the interests of private individuals who might be connected with them.

In order to understand what *vakoufs* are we will suppose that in Bulgaria, under Turkish rule, an individual built a mosque, or disposed of part of his property, either by donation or by request, to maintain a mosque, school, or charitable institution. At his death, we will suppose,

¹ We will be all the more convinced of this, if we will remember that in the Austro-Turkish convention relating to Bosnia and Herzegovina an analogous disposition disguises in the same manner the conveyance for a lump sum, purely nominal rights of sovereignty which the Treaty of Berlin in recognizing the Austrian occupation, had reserved to the Sultan just for the sake of form.

he leaves property, houses, shops, for the purpose stated above, specifying that part of the revenue, one-fifth, or one-eighth, for example, shall revert to executors of his will, members of his family, or to their descendants. A part of this revenue reverts likewise to the administration of the vakoufs, with headquarters at Constantinople. The property disposed of in this manner, as well as the religious establishments themselves, are withdrawn from the commercial world.

What will happen on the day of independence? The majority of the Turks or Ottomans emigrate, and neglecting to avail themselves of the first paragraph of Article XII of the Treaty of Berlin, sell their property, sometimes even property set aside for religious establishments, in spite of the prescriptions of the law of Chériat. Infidel legatees appropriate unto themselves the whole of the endowments. The property of the vakoufs is at times confiscated for the needs of the public service. Mosks and schools fall into ruins, become useless; nobody to take care of them, nor funds to maintain them.² As for the property devised for certain specific purposes, what has not been sold has disappeared. The question arises, how the Turkish Government in the name of the vakoufs ministry, and the beneficiaries of the founders or testamentary executors will, after thirty years, bolster up their claims and produce their titles of ownership?

Regarding the "teвлиets," the situation is even more confused. Their origin dates back to the feudal system of the Turkish conquest, to concessions which the government at Constantinople granted to certain pachas as reward for services rendered, to certain rights of titles granted to several villages for furnishing troops or service in time of war. Certain State lands or vakouf properties were granted them also. The grantee, in return, had to have certain public works executed, keep up the roads, dig wells, etc. He attended to these things through forced

² At Philippopoli, where nevertheless from 5,000 to 6,000 Turks have remained, the mosks have organized membership except in certain quarters of the city; in the rest the Mussulmans themselves request the civil authorities to admit them to the Christian worship rather than leave them adrift. At Sofia a lone mosk has been kept open to worship for about twenty families, not Turks, but Mussulman gypsies, so poor that the government provides the funds necessary to maintain the monument. St. Sophia is in ruins, another mosk has been converted into a museum, and another has been rebuilt into a church.

labor. These tithes rights disappeared with the emancipation. But the owners or their beneficiaries have continually presented their rightful claims and bestirred themselves anew at the time of the Turko-Bulgarian negotiations. They claim to have the right to demand an annual allowance equivalent to the total amount of tithes. Without refusing to listen to their claims, the Bulgarian Government has constantly presented a plea of inability difficult to overcome. It asked for the original titles, for firmans several centuries old, or asked them to fulfill the pledges demanded by the original titles. "Forced labor" has gone out of commission, and the expenses connected with the performance of the public service would by far outweigh the total of the tithes. In Rumelia many have surrendered their rights for ridiculous sums. But others still, or their representatives, have taken their claims to Constantinople and succeeded in winning members of Parliament and the government over to their side. The Turkish plenipotentiaries were ordered to reach a compromise on the subject; but the Bulgarian Government standing by its former decisions thought that these private claims should be taken to court and the genuineness of the titles proven. It should be noted that the Turkish claims, according to a list made from the registers at the vakoufs ministry, amounted to the fantastic sum of six hundred million francs.

The Bulgarian plenipotentiaries, though desirous to show themselves conciliatory, could not undertake to discuss any such pretensions. At the most they might have been willing to capitalize a sum of about sixty thousand francs, carried on the budget of the principality of 1886, representing annuities that the Rumelian Government paid to certain owners of *tevllets* the validity of whose titles it had recognized. This capitalization might have amounted to one million francs. It was impossible to agree. A waiting policy was adopted, which, by making it possible to give careful attention to individual claims, settled definitely the question from the diplomatic point of view. According to the terms of Article 2 of the Turko-Bulgarian protocol:

Regarding the vakoufs *mustesna*, the Bulgarian Government shall within three months appoint an administrative commission which will investigate the validity of the claims of interested parties.

Whoever understands the slowness of procedure by administrative commissions and the constant atterminings to which affairs in the Orient are subject will doubt if the beneficiaries of the former owners of *tevllets* will derive much hope from this stipulation.³

As for the *vakoufs*, Articles 7 and 8 of the arrangement annexed to the protocol of Constantinople are intended to prevent in future the removal of those that still exist, and to preserve the rights of the founders (*mutevellis*) or of their beneficiaries.⁴

The Bulgarian Government may well feel elated over this solution of the question. It is sovereign judge of all claims which may be presented. It has been freed of the vestiges of an important mortmain, and every possible pretext for diplomatic intervention on the part of the Turkish Government has been removed.

We have thus surveyed the cycle of ancient servitudes which burdened the economic life of the Bulgarian people; but we still have to examine the financial obligations, lighter, of course, than formerly, that still rest upon them.

³ As a matter of fact, up to the present time, the commission has held no meeting.

⁴ These articles read as follows:

"Art. 7. — Great care shall be exercised to keep in good condition all *vakoufs* property situated in Bulgaria. No edifice for worship or of charity may be torn down except for imperious need and in accordance with the laws and regulations in force. In case a *vakouf* edifice is to be expropriated for imperious reason, this can be done only after another location shall have been designated of the same value with respect to the place where it is situated and after full payment of the value of the building. The amounts to be paid as price for *vakoufs* property appropriated for imperious reason shall be entirely devoted to the maintenance of *vakoufs* property situated in Bulgaria and to the construction of other religious establishments in localities where the need of such establishments may be felt. The chief mufti is charged with the control of the accounts relating thereto and to prevent mismanagement of the funds.

"Art. 8. — Within six months after the signing of this document, a special Commission, of which the chief mufti shall by right be a member, shall be appointed by the Bulgarian government; the object of this Commission shall be, within three years of the date of its organization, to examine and verify all claims presented up to the present time by the *mutevellis* or their beneficiaries. Those interested who are not agreeable to the decisions of the Commission may appeal to the competent court of the country."

FINANCIAL MATTERS

1. *Tribute and contributive taxes.*—We have seen already why the tribute due by Bulgaria to Turkey, in virtue of Article IX of the Treaty of Berlin, was to be considered as a mark of vassality; but, in this particular respect as well as in many others, the tie of vassality had slackened long before the declaration of independence, for the tribute was never paid; and here is the reason: this fetter was not the only one which the Treaty of Berlin meant to impose upon the finances of the new State. Let us look for a moment at Article IX, which contains the gist of the entire matter:

The amount of the annual tribute which the Bulgarian principality shall pay to the suzerain court and to be deposited into a bank that the Sublime Porte will subsequently designate, shall be determined by agreement between the Powers signatory to the present treaty at the expiration of the first year of the operation of the new organization. This tribute shall be based upon the average revenue of the territory of the principality.—Since Bulgaria is to bear part of the public debt of the Empire, when the Powers shall determine the amount of the tribute, they will consider part of this debt that might be attributed to the principality upon the basis of an equitable proportion.

Thus, in virtue of this text, there is a double obligation: 1st, obligation of the tribute relating to vassality; 2nd, obligation relating to a part of the Ottoman public debt.⁵

It is perfectly clear from the protocols of the Congress that the plenipotentiaries were most anxious to guarantee the rights of Turkey's creditors, the holders of bonds of the Ottoman public debt. This was cleverly brought out by Karatheodory Pacha when he remarked that the revenues of the localities composing the new principality had formerly been allotted in a general way to all of Turkey's public debt, and that only a few of these revenues had been deflected in a special manner to the service of certain loans. He, therefore, asked that the tribute be paid partly to the Ottoman Government, while the taxes should be used to satisfy the holders of bonds. The plenipotentiaries representing the holders of bonds, whose activities had manifested themselves through numerous petitions to the Congress, closely watched over the bond-

⁵ *Yellow Book*, Protocol No. 7, pp. 122 *et seq.*

holders' interests and subordinated the tribute question by deciding that the amount of it should be decreased in proportion to the increase of the taxes according to the capacity of the principality. They wished at the same time to guarantee the creditors' rights and to avoid over-taxing the Bulgarian finances.

The plenipotentiaries discussed for some time as regards the tribute and the taxation, the best way of apportioning them: extent of territory, amount of taxes originally paid, average amount of the revenues of the principality. The last item was finally agreed to as a basis on which they would figure out the amount of the tribute; but as for the taxes, they decided to leave this question to be equitably settled by a subsequent agreement; but no subsequent agreement ever took place, for the simple reason that the European governments have had more pressing problems to solve. Inasmuch as the quota of the tribute could not be finally determined until after the question of taxes had been settled, nothing has been accomplished accordingly, and no claims were entered against Bulgaria. Turkey herself lost all interest in the matters since the amortization fund alone would have profited by the respective payments.

Her creditors, however, more directly affected by the depreciation of their securities, demanded adjustment of their claims at two different times.⁶ First, in 1881, on the occasion of the firman of December 20, creating the administrative council of the Ottoman debt, by which the Ottoman Government delegated to its creditors the claims which it held under the two heads of tribute and taxes against Bulgaria, Greece, Serbia, Montenegro, together with the accumulated dues against Eastern Rumelia, declaring at the same time that as long as the Bulgarian tribute was not fixed, it would be replaced by annuities levied upon the tobacco revenue. Having become in this way the direct creditor of Bulgaria, the administrative council of the Ottoman debt urged the Ottoman Government to prod the signatory Powers of the Treaty of

⁶ See Serkis, *La Roumélie orientale*, p. 203. According to the archives of the administrative council of the Ottoman public debt. Cf. Andréadès, *Les obligations financières envers la dette publique ottomane des provinces détachées de l'Empire turc depuis le traité de Berlin*, in the *Revue générale de droit international public*, tome XV (1908), pp. 585 et seq.

Berlin to fix the amount of the two sums. A circular note, dated January 15, 1883, was for this purpose addressed to the Turkish representatives in Europe. The cabinet seemed but slightly affected by the activity of the representatives of the Sublime Porte. Austria-Hungary answered that she would adapt her attitude to that of the other Powers; England seemed to take greater interest in the matter, suggesting a mode of computing to determine the portion relating to each of the small co-debtor states. Nothing more came from it.

In consequence of the Rumelian revolution, the Bulgarian Government, when pressed by the administrative council of the debt to meet its obligations, answered that it could not pay tribute to a State that refused to give it full recognition. The bondholders then appealed directly to their respective governments.

Up to the time of the declaration of independence, no annuity had ever been paid. It is difficult to blame Bulgaria for this; it would have been expecting too much to compel her to undertake the task of nearly inextricable computations, when the inaction of the responsible Powers was relieving her budget of an important item. So spake the Bulgarian plenipotentiaries when the Turkish delegates demanded payment of the arrears in tribute and taxes. How determine after a lapse of thirty years the average revenues of the principality in order to fix the tribute, and how provide material for the appreciation of the Powers in order to reach an equitable decision in regard to taxes? Moreover, the Bulgarian plenipotentiaries pleaded absolute inability to meet any demand for indemnification or capitalization: the tribute had never been paid, would never have been paid, hence Turkey did not incur any material prejudice in this respect on account of the declaration of independence. In addition they invoked a kind of prescription covering a period of thirty years, and the example of other Danubian States that had not contributed to the relief of part of Turkey's indebtedness.

Turkey which had in this respect presented a claim amounting to hundreds of millions had to drop it at last. It is true that the arguments of the Bulgarian plenipotentiaries were arguments of fact. Juridically, Turkey might have insisted. It is certain that under the two heads of tribute and taxes, Bulgaria was obligated: all that could be said is that the obligation could not be met; but Turkey might have sug-

gested that it be settled, for prescription does not hold in international public law.⁷

2. *The Rumelian indemnity.* — In consequence of an explainable confusion, the public may have thought that Bulgaria had consented to indemnify Turkey because of the suppression of the tribute. The plenipotentiaries have in effect consented to pay an indemnity, but relating to the contribution, which, falsely termed tribute, has been paid by Rumelia, and not to the tribute correlative to vassality which had been imposed upon primitive Bulgaria.

The origin of this obligation is deserving of some explanation. The European Commission charged by the Berlin Congress with the organization of Rumelia was to determine her financial policy. It decided that the province should pay to the Porte a rent calculated upon her average revenues for the last four years. These revenues were estimated at eight hundred thousand Turkish pounds, and the rent fixed for the following five years at three-tenths of that sum, or two hundred and forty thousand Turkish pounds.⁸

But Eastern Rumelia had been, if not nearly ruined, severely stricken by the war. It was soon realized that an estimate of her revenues calculated upon the years preceding the war no longer corresponded to what they had been. The collection of taxes was, moreover, becoming very difficult, in consequence of the transformation of the Turkish tithe into land-tax, decreed by the commission, and also because of the

⁷ With particular reference to the matter of taxes, we will merely remark that the Berlin plenipotentiaries thought that this burden was *by right* incumbent upon Bulgaria by the mere fact of separation. It has been for a long time an uncontested opinion in spite of its debatable character, that in the case of dismemberment a quota of the debt of the dismembered state falls *ipso facto* upon the newly created state. This means a transposition of private into public law coming from the theory attached to inheritances, but which in our judgment is juridically false. There is no inheritance in the matter of sovereignty, but substitution: this the Bulgarian plenipotentiaries could have invoked. But it might have been answered that it is always possible to derogate conventionally to strict juridical principles; that, moreover, there had not been substitution, since Bulgaria in theory had not ceased to be part of the Ottoman Empire. They might then in their turn have demonstrated that suzerainty is not the same as sovereignty, and contended that Bulgaria in this respect had really not contracted a conventional engagement. But it is unnecessary to remark that these theoretic controversies were not brought forward.

⁸ Minutes of the Commission, No. 49, and Organic regulations, Chapter I, Art. 16.

scarcity of specie. In consequence, in 1882, the Provincial Assembly resolved that in future the proportion of three-tenths should not be applied to the supposed average revenues, but upon the actual revenues of the province. The net actual revenues were estimated at six hundred thousand Turkish pounds, and the annuity at one hundred and sixty thousand pounds for a quinquennial period of years beginning March 1, 1883.

The administrative council of the Ottoman debt, to which, as we have stated, these revenues had been applied, protested, maintaining that the province had been taxed on its gross revenues and in a definitive way. The Government at Constantinople affixed its veto to the Rumelian law, but the Ottoman Bank, preferring to cash the sum fixed by the Provincial Assembly rather than find itself deprived of any income whatever, concluded with the latter a convention on the basis of the one hundred and eighty thousand pounds, an agreement against which the Ottoman Government did not protest.

At the time of the Philippopoli revolution considerable arrears were due upon this sum; and besides, the Bulgarian Government endeavored to escape from the new burdens that the union imposed upon her. Not until three full years had passed by did the administrative council of the Ottoman debt succeed in having its rights duly recognized. In 1887, a law, confirmed by princely rescript of December 17, ratified an arrangement entered into between the Bulgarian Government and the administrative council of the Ottoman debt according to which Bulgaria was to pay annually one hundred and fifty-two thousand Turkish pounds. This amount has been paid regularly up to the time of the declaration of independence; it appeared even in the budget of 1908.

Every monthly instalment under these two heads has in effect been intercepted at the Bulgarian National Bank from the day of the declaration of independence. The Bulgarian Government has wished to emphasize that from that day, every official bond between the Ottoman Government and its ancient province had been severed. This payment had indeed been the last vestige of the union, the last official obstacle to the fusion of the two Bulgarias into one State. The indemnification was arrived at on the basis of the capitalized annual payments. In

strictness the Ottoman Government could have demanded that it should be calculated on the basis adopted in 1879 by the European Commission, for the conventions of 1883 and 1887 between the administrative council of the Ottoman debt and the Rumelian and Bulgarian Governments being so far as the Ottoman Government is concerned *res inter alios acta*, but this pretension, juridical though it be, had not a chance of being received by the Bulgarian plenipotentiaries, who interpreted the silence of the Porte as a tacit approval of the arrangements made with her delegated creditors. The Government at Constantinople was in this manner compelled to accept the capitalization on the basis of ninety-nine years, making in round numbers forty million francs.⁹

3. *The Russian loans.* — To free herself gradually from the political and economic shackles that were binding her, Bulgaria had, therefore, to make heavy pecuniary sacrifices; she did not hesitate to settle the cost of her independence for a hundred million francs.

In reading Article 3 of the Russo-Turkish protocol of March 3, 1909,¹⁰ where we find the several indemnities paid to Turkey enu-

⁹ See Article 3 of the protocol of St. Petersburg, and Article 1 of the protocol of Constantinople.

¹⁰ The full text of the protocol, preamble and preface of the Turko-Bulgarian protocol follows:

The Imperial Russian Government being desirous of assuring to the Imperial Ottoman Government the sum of 125 million francs in settlement of all claims of the Sublime Porte against Bulgaria, the following agreement has been entered into:

ARTICLE 1. — In view of permitting the Sublime Porte to realize the sum of 125 million francs the Russian Government remits to Turkey fully and finally 40 of the 74 outstanding annuities due Russia on account of the war indemnity fixed by the treaty of Jan. 27/Feb. 8, 1879, and by the convention of May 2/14, 1882; the Imperial Ottoman Government having settled all annuities due on account of the war indemnity up to Dec. 31, 1908, said remission shall enter in force beginning Jan. 1, 1909.

ARTICLE 2. — The Imperial Ottoman Government shall have the right until July 1 to capitalize the 34 annuities outstanding over and above the 40 annuities remitted by Russia by appraising these annuities at their actual value at the rate of four per cent. par. — In case the Imperial Ottoman Government does not avail itself of this privilege, it shall have the same privilege at the expiration of the 40th year, capitalization at this date to be calculated at the rate of the then credit of the Ottoman Empire as shall be established by agreement between the two governments.

ARTICLE 3. — The sum of five and a half million Turkish pounds, or 125 million francs accruing to the Imperial Ottoman Empire represents by 40 million francs the obligation of Eastern Rumelia, and by another 40 million francs the 310 kilometers

merated, it would seem that it rose above one hundred million francs, for it reads as follows:

The sum of five and a half million Turkish pounds, or 125 million francs, accruing to the Imperial Ottoman Empire represents by 40 million francs the obligation of Eastern Rumelia, and by another 40 million francs the 130 kilometers of Eastern Railways situated in Eastern Rumelia and seized by the Bulgarian Government, by 2 million francs the cost and the arrears of rent of the Bélova-Vakarel line, and by 43 million francs the equivalent in value of the properties of the domain of the Ottoman state, situated in Eastern Rumelia and in Bulgaria;

to which must still be added all sums promised for posts and telegraphs, sanitary service, and the immediate debts of Bulgaria due the Eastern Railway Company, according to Articles 3-7 of the protocol of Constantinople.

Nevertheless, by a curious and clever financial combination, the Russian Government has shouldered a goodly portion of the Bul-

of Eastern Railways situated in Eastern Rumelia and seized by the Bulgarian Government, by 2 million francs the cost and the arrears of rent of the Bélova-Vakarel line, and by 43 million francs the equivalent in value of the properties of the domain of the Ottoman state, situated in Eastern Rumelia and in Bulgaria. The Imperial Ottoman Government, in consequence, renounces its rights derived from Article 9 of the Treaty of Berlin, the Bulgarian tribute, the contributive Bulgarian taxes to the public debt of the Empire, and also its rights to arrears of the Eastern Rumelian obligation as determined by the Organic Regulation and annexures thereto. — The Bulgarian Government shall pay interest at 5 per cent. upon the 40 million francs of the Rumelian obligation beginning September 22/October 5, 1908, until the ratification of the protocol.

ARTICLE 4. — The Bulgarian Government renouncing, by a declaration signed simultaneously with the present arrangement, all claims under the terms of paragraph 1, of Article 10 of the Treaty of Berlin relating to the Roustchouk-Varna railway, the Ottoman Government will make note of said declaration.

ARTICLE 5. — It is agreed that the questions and claims regarding vakoufs and religious communities, posts and telegraphs, lighthouses and sanitary administration are entirely excluded and shall form the subject of a direct agreement between the Imperial Ottoman Government and Bulgaria. — It is also agreed that the immediate debts of Bulgaria due to the Eastern Railway Company, resulting from rolling stock and material seized, etc., and the operating indemnity are excluded from the present arrangement.

Signed: *ad referendum*,

ISWOLSKY.

St. PETERSBURG, March 3, 1909.

Signed: *ad referendum*,

RIFAAT.

garian obligations, about forty million francs, which Turkey receives directly from her.

To understand the mechanism of the combination, we should remember that Turkey, creditor of Bulgaria, was indebted to Russia, since the war of 1878, for a considerable indemnity the payments of which were graduated over a period of ninety-nine years. But, it happened that about the end of 1908, the Turko-Bulgarian negotiations regarding the recognition of independence were, so to say, paralyzed. The Malinoff cabinet, by its reiterated declarations, had affirmed that the country was not in condition to submit to enormous sacrifices. It wound up its declarations with an offer of a lump sum of eighty-two million francs which it thought sufficed amply to indemnify Turkey for what it termed "material prejudices" that independence had brought to Turkey, and also the Eastern Railway Company for the annulment of its concessions. The Turkish Government, on the other hand, after having abandoned the exorbitant demands which it had presented at first, amounting to hundreds of millions, refused to accept a sum less than one hundred and twenty-five million francs, declaring its inability to obtain on any other conditions the consent of Parliament and of the company to the desired agreement. The relations between the two countries became strained and the conciliatory moves of the European cabinets seemed inefficacious, when the Government of St. Petersburg intervened. It offered to shoulder itself the forty-three million francs which kept the rival pretensions apart and at the same time to loan Bulgaria the eighty-two million francs necessary to free herself. For this purpose it would remit to Turkey the payment of a certain number of annuities of the war indemnity, enough to make up the one hundred and twenty-five million, from which she declared she would not recede, and the Ottoman Government would take it upon itself to indemnify the Eastern Railway Company.

In consequence of laborious negotiations, the protocol of St. Petersburg adopted the following solution: In order to permit the Sublime Porte to realize the sum of one hundred and twenty-five million francs, the Russian Government remits to Turkey fully and formally forty annuity payments of the seventy-four still outstanding on account of the war indemnity. Moreover, the Ottoman Government, which was

desirous to be completely liberated, should have the right until July 1, 1909, to capitalize the remaining thirty-four annual payments, calculating these payments on their actual value, at the rate of four per cent. par. The Russian protocol assumed upon itself acceptance by Bulgaria, and left to her the settling of minor debts relating to posts, telegraphs, lighthouses, etc. Seizing eagerly this un hoped for opportunity of ridding herself of a situation which was becoming inextricable, Bulgaria readily accepted the stipulations of the St. Petersburg protocol.¹¹ Turkey, which thanks to the capitalization of the war annuities, found her budget in this manner lightened by a sum by far inferior to the total of the indemnity, was able to release the revenues which guaranteed the payment of this indemnity, and to offer them as pledge to the lenders with whom she has negotiated a new loan, designed not only to indemnify the Eastern Railway Company for a sum of nineteen million francs, but to furnish it with the necessary funds for its administrative and political reorganization.¹²

If we calculate upon the data furnished by the Russo-Turkish protocol, we find that the Turkish Government receives not one hundred and twenty-five, but one hundred and twenty-nine and a half million francs. The four and a half additional million which it has received have served to organize a syndicate for the purpose of indemnifying the company, and to meet the expenses of the loan. To arrive at these one hundred and twenty-nine and a half million, it was necessary we said to capitalize interest and principal of forty annuities of seven and a half million each, making a total of three hundred and two million francs by which the amount due to Russia is at present diminished.

Russia had now to come to an understanding with Bulgaria for the partial reimbursement of her quitclaim to Turkey. This led to an arrangement of April 6, 1909, negotiated at St. Petersburg between M. Iswolsky and the Bulgarian Secretaries Sallabacheff and Paprikoff.¹³

¹¹ *Vide*, Article 1 of the Turko-Bulgarian protocol.

¹² The loan is for 7 million Turkish pounds, 4 per cent. interest, 1 per cent. amortization. *Vide, Le Temps*, Sept. 7, 1909.

¹³ The text of this convention follows:

The Imperial Russian Government having settled through the Russo-Turkish protocol of March 3, 1909, the Bulgarian obligations to Turkey arising from the

The Bulgarian Government acknowledges its indebtedness to Russia for the total sum of eighty-two million francs; it pledges itself to pay interest at the rate of four and three-quarters per cent. Amortization is to be effected in seventy-five years. Capital and interest thus amount to a little more than four million francs per year, but Bulgaria has the right to amortize sooner, to settle the entire debt whenever she desires to do so.

The advantages accruing to Bulgaria under this financial combination are self-evident. Not only has she been able to rid herself of her indebtedness to Turkey at an unhoped-for price, but she was enabled to obtain the money necessary for the purpose on the most advantageous conditions. And lastly, it may be added, Bulgaria liberated herself by means of a written instrument, instead of being obliged to borrow cash which she would have had to pay into the Ottoman treasury.

The Tsar's government has made a sacrifice; this is undeniable. Yet, it benefits by an anticipatory arrangement, and acquires a more solvent debtor. The payments of the war annuities had been irregular and the future solvency of the Ottoman Empire remains more or less problem-

Bulgarian declaration of independence and the seizure of the Eastern Railways by the Bulgarian Government, the following agreement has been concluded:

ARTICLE 1.—The Royal Bulgarian Government, in view of the definitive settlement of the financial claims of Turkey consigned in the protocol mentioned hereafter, hereby recognizes its indebtedness to the Imperial Russian Government in the sum of 82 million francs.

ARTICLE 2.—The Royal Bulgarian Government guarantees to acquit itself of this indebtedness in 75 years at $4\frac{3}{4}$ per cent. interest, constituting an annuity (interest and amortization) of 4,025,600 francs payable in equal semi-annual instalments on April 1 and Oct. 1. The first payment shall be made Oct. 1, 1909. The Imperial Russian Government shall receive interest beginning with the date of the recognition of Bulgarian independence by Turkey.—It is agreed that the Royal Bulgarian Government, the case occurring, shall pay a monthly interest of one half per cent. on all arrears.

ARTICLE 3.—The Royal Bulgarian Government has the right, at any time it may choose to do so, to liberate itself of the entire present indebtedness by paying the entire amount of the indebtedness left to be amortized.

ARTICLE 4.—All payments referred to in the present protocol shall be effected in francs, at Paris, to the order of the Imperial Russian Bank.

ST. PETERSBURG, April 6, 1909.

Ad referendum: S. PAPRIKOFF

IVAN SALLABACHEFF

Ad referendum:

ISWOLSKY.

atic. On the contrary, there can be no doubt about the regular payment of the annuities of the Bulgarian loan.

Occupation indemnity. — The obligation which Bulgaria has thus contracted is, however, not the only one she bears toward Russia. The treaty of Berlin, in Article XXII, specifies¹⁴ that the Russian army of occupation in Bulgaria and in Eastern Rumelia shall be maintained at the expense of the country occupied. On this account, Russia became the principality's creditor for twenty-four million francs, and creditor of the province for the sum of twenty-seven million francs. The occupation indemnity due by Bulgaria was paid almost regularly; the last payments were made about three months ago. But the Rumelian indemnity is still unliquidated.¹⁵

4. *Loans and control.* — The financial independence of Bulgaria is elsewhere more seriously threatened.

Owing to her weak credit in the financial markets of the world and the onerous terms accepted by her upon the conclusion of her loans, there has arisen a kind of controlling institution which affects more her national pride than it does weigh upon her political liberty. Viewed from this angle, we may not say, however, that the Bulgarian financial situation is as bad as that of Greece or of Egypt.

¹⁴ Article XII reads as follows: "The effective Russian army of occupation in Bulgaria and in Eastern Rumelia shall be composed of six divisions of infantry, and two divisions of cavalry, and shall not exceed 50,000 men. It shall be maintained at the expense of the country occupied."

¹⁵ In 1879, at the time of the first meeting of the provincial assembly at Philippopoli, Prince Tzarétéleff, Russian Consul-General, declared in the name of the Russian Emperor that, inasmuch as Rumelia had, more than any other country, suffered from the ravages of war and of famine, the Russian Government would not insist upon any regular annuity payments, and would not demand interest on arrears. In effect, the Russian Government has let these arrears accumulate and for a time it was thought that the Russian Government had remitted its claim. In reality, however, it has repeatedly urged settlement of the claim, and its reminders have at times been pressed home, in threatening manner, designed to weigh on the political conduct of the debtor. It acted in this manner toward the provincial government when Aleko Pacha refused to renew the contract of the sixty Russian officers in the service of the Rumelian militia. Since 1895 demands for payment of arrears have been made three times, under the cabinets of Stoïtoff, Rodoslavoff and Daneff, but no agreement could be reached regarding the terms of payment.

This experience should suffice, and the Bulgarian Government avoid delay in paying the instalments relating to the new loan which it has contracted in Russia.

The Bulgarian Government having always honored its legitimate obligations, no foreign Power has interfered with the administration of her finances. This is a matter for congratulation, for, financial interferences rightly irritate the national susceptibility of the people, and in an indirect but real fashion deprive the government which allows such imposition, of every freedom of pacific or military action.

Particularly sensitive in Bulgaria, would national honor have borne with financial intervention? We have reason to doubt it, if we only remember that Bulgarian public opinion does not look with favor upon the partial and withal private control which those banks that represent the bondholders have thought necessary to exercise in their behalf. The organization of this control dates back to 1902. Once before, the money lenders had taken some precautionary measures. In 1888, at the time of the repurchase of the Roustchouk-Varna Railway, the Bulgarian Government had guaranteed by the State revenues the payment of the annuities of the loan of forty-four and a half million francs necessitated by this operation. But this general guarantee, whose enforcement was not effectively organized, in no way diminished her freedom of action.¹⁶ In a loan of thirty million francs, negotiated in 1889, the Bulgarian Government had given as guarantee a first mortgage on the Tzaribrod-Sofia-Vakarel and Yamboli-Bourgas Railways. If payment of the coupons was delayed six months, the bondholders were to have the right to take over the operating of the railways, and at the end of two years to proceed to their sale (Art. 4).

Up to this point there is no great obstacle to the government's freedom of action; the pledge is represented by the works themselves that make the loan necessary. But with the loan at five per cent. in gold, 1902, we behold the new factor. The loan is guaranteed in the first place by the tax on *bandrols*, that is to say, upon the product of their sale to tobacco and cigar merchants of small bands of paper wound around boxes or packages; secondly, it is guaranteed by the tax on the *Mourourié*, or tax on the cultivation and sale of tobaccos. Now, the system adopted for the guarantee of this loan creates a representative of the bondholders appointed by the banks that put these

¹⁶ *Vide*, Article 6, of the loan contract, repaid in full to-day. State of the Public Debt, Ministry of Finance, 1908 (printed in Bulgarian).

bonds in circulation. This representative exercises all the rights and actions of the bondholders (Art. 34); he occupies a high financial and social position, justified, moreover, by his personality.¹⁷ The Bulgarian Government pays the sum of seventy-five thousand francs for his salary and that of his employés and assistants. He must take care to insure the quarters set aside for his habitation and work (Art. 35). Although private establishments name the delegate, and although he represents private individuals, yet because the great majority of the bonds are held by Frenchmen, he maintains semi-official relations with the French legation. It is through the medium of the French minister-resident that the appointment of this delegate is signified to the Bulgarian Government. For this reason, the delegate, though he is not the financial agent of a foreign government, is nevertheless to some extent a certain international personality which makes of him a little more than the agent of private institutions. He exercises, moreover, certain powers which have really to do with public order, and his effect upon the Bulgarian Government is evident. It is he who has supervision over the manufacture and sale of the bandrols. Assisted by a government commissioner, who is the intermediary between him and the Bulgarian authorities, with which he often deals directly, he orders the manufacture of the bandrols in France, locks them in a secure place to which there are two keys, one of which he himself keeps and the other he turns over to the governmental delegate. He hands out these bandrols only for cash; one hundred thousand francs at a time at least, seven hundred thousand francs per month at least. If the purchase of bandrols does not equal the semestrial amount of the annuities, then the Bulgarian Government must make up the balance with cash, and the delegate forwards the amounts received regularly to the Bank of Paris and of The Netherlands. A special report regarding the revenue of the taxes on the Mourourié, subsidiary guarantee of the loan, must be communicated to him. Such is the field of his material activity. But these are not the only obligations of the Bulgarian Government.

In order to avoid fluctuation of the exchange, so that the bondholders may not sustain losses on remittances made to Paris through

¹⁷ This delegate is our very distinguished compatriot, M. Bousquet, honorary State-Councillor, to whose publications we have often had occasion to refer.

the medium of the delegate, the Bulgarian State, during the period of the loan, is forbidden to modify any of the laws that regulate the fiduciary circulation of the Bulgarian National Bank, and forbidden to mint silver coin except upon agreement to this effect with the delegate. It also agrees not to issue any new fiduciary notes without his authorization (Art. 25). Likewise, it agrees, in order not to affect the guarantee of its creditors, not to change either the basis or the mode of collection of the loans hypothecated. Lastly, it pledges itself (Art. 34), but for a period of two years only, to float no other loan, nor to guarantee any loan (for instance, of its public institutions) without the authorization — that means really without the participation — of the united banks. Surrendering the right to modify the taxation laws, the fiduciary circulation, to borrow money, and all this power in the hands of a semi-official personage, does not that mean a real diminution of the government's financial independence? There is an exception, in case there should be war; but in ordinary times, the fact is significant.¹⁸

There is little probability that Bulgaria will soon be able to free herself from this control. The loan contracts do indeed stipulate that she may anticipate reimbursements; but this hope seems chimerical, for she was really not thinking of refunding the millions of this debt, if it is not through conversion, that is to say, through a new loan whose conditions could scarcely be less onerous. The loan of 1902, interest and amortization, was to run until 1953; that of 1904 admits of amortization in fifty years, that of 1907 in sixty years, which means that economic servitude which weighs on Bulgaria very likely will continue for another half century.

At the present time the unredeemed part of the floating debt (fifty million francs in the least), expenses necessitated by military measures taken in the course of the recent crisis, contracts made by the Govern-

¹⁸ A new loan, at 5 per cent., was guaranteed in 1904, as the last mentioned, by the excess of the bandrol and Mourourié taxes, and in addition by the stamp duty, which, in its turn, has been legislatively and economically immobilized. Lastly, still another loan, 4½ per cent., in gold, 1907, touches in part the revenue of the Mourourié tax. The privilege of the united banks regarding the floating of new loans was, in virtue of this new contract, to run until April, 1909. The Bulgarian Government has but just liberated itself from that shackle.

ment relating to public works, and, in particular, the railways, have made necessary a new loan of one hundred million francs, which was placed in Austria and in Switzerland, for the reason that negotiations for it failed in Paris, owing to the repugnance felt by the Bulgarian Government to offer new securities.

GEORGES SCELLE.

THE HISTORY OF THE DEPARTMENT OF STATE

IX

DUTIES OF THE DEPARTMENT

IV

We considered in a former number of the JOURNAL¹ the chief publications of the Department. The President's annual message to Congress usually contains a statement of our relations with foreign Powers, and this serves as the annual report of the Secretary of State. A regular annual report to the President or Congress is required from the heads of other departments but not from him. When Richard Olney was Secretary, however, he made a report dated December, 1896, entitled "Report of the Secretary of State" for that year. It was intended to be the first annual report, but the example was not followed.

The management of foreign affairs being the most important of the regular duties of the Department, the supervision of the diplomatic and consular service are its chief duties. The general rules which govern the foreign service are found in the works on international law and particularly in the American digests; but two special publications have been issued by the Department of State for the guidance of its agents abroad — the Diplomatic Instructions and the Consular Regulations.

The Diplomatic Instructions were formerly only a printed circular. When John Quincy Adams was Secretary of State in 1820 he conceived the idea of having two sets of instructions for diplomatic officers — general instructions applicable to all, and personal instructions applicable to a particular mission or officer.² The general instructions were to include: "their correspondence with each other; their deportment to the sovereign to whom they are accredited, and to the Diplomatic corps of the same Court; their relations with the Consuls of the United States in the

¹ October, 1911.

² Diary, V, 143.

same countries; their duties with regard to granting passports; to insist upon the alternative in signing treaties, and to decline accepting the presents usually given by Kings on the conclusion of treaties and to departing ministers." He thought that even more comprehensive standing instructions would be useful.³

Additions to the regulations were made from time to time, until, under the supervision of William Woodville Rockhill, Assistant Secretary, they were paragraphed as in the case of the Consular Regulations and issued as a separate volume in 1897.

The Consular Regulations is a far more bulky book and its tendency is to increase in size. There are more than 1,200 people in the American Consular Service, and the rules for their conduct are embodied in some 3,000 paragraphed regulations. The first issue of the book was in 1855 when William L. Marcy was Secretary of State, and followed the Act of March 1, 1855, remodelling the Consular Service, this book being entitled "General Instructions to the Consuls and Commercial Agents of the United States, Prepared under the Direction of the Department of State." The Act of August 18, 1856, provided for a second edition, which appeared in 1857, entitled "Regulations Prescribed by the President for Consular Officers of the United States." The next issue was in 1870, Hamilton Fish being Secretary of State; another was in 1874; another in 1881; another in 1888; the last in 1896.

These regulations are issued by the President in accordance with law and have the force of law. They are prepared chiefly in the Consular Bureau, but many hands enter into their composition. When a new edition is to be issued they are sent to the White House for the President's approval, which is commonly given *pro forma*; but when the copy for the edition of 1888 was sent to President Cleveland for his signature he kept it beyond the time occupied by the routine usual in such cases. According to the report circulated, he read the regulations through before he approved them and declared he had found them interesting.

The Department has no higher function than that of making treaties—those agreements with foreign Powers which regulate our international relations and are, under the Constitution, "the supreme law of the

³ Diary, V, 166, 167.

land." Rules for negotiating them are an important section in works on international law, and will not be repeated here, except as they are a part of the executive duties of the Department.

Indian treaties, it should be remarked, of which formerly many were made, were never negotiated by the Secretary of State, but by special commissioners acting for the President under the War Department, which had control of Indian affairs until the Department of the Interior took over the business. They were filed with the Department of State, however, as the other laws are. There have been no Indian treaties made since the Act of March 3, 1871, which forbade further recognition of Indian tribes or nations as independent Powers.

Postal conventions with foreign governments were negotiated by the Secretary of State, until the Act of June 8, 1872, required that they be made by the Postmaster General and become binding when signed by him and approved by the President, the power of the Senate to advise the ratification of treaties being delegated in this case. All other treaties are made by the Secretary of State. Often he conducts the negotiations in person; himself has the interviews with the foreign envoy, drafts his own notes and the treaty itself. He may have the assistance of any officer he chooses — of one of the Assistant Secretaries, the Solicitor, a Bureau chief, or several persons. Or the treaty may be negotiated by some officer of the Department for the Secretary. The methods vary greatly, and the record of the negotiation is voluminous and minute in some cases and meagre in others. It is usual, however, when an important verbal communication has been made to the Secretary in the course of negotiating a treaty for him to draw up a memorandum of its substance to go upon the record, and often the memorandum is submitted to the foreign envoy so that there shall be no misunderstanding. The foreign envoy may leave a written statement of what he has said with the Secretary.⁴

The business of negotiating a series of treaties was delegated to a special representative, in 1897, when John A. Kasson was appointed Special Commissioner Plenipotentiary under the Tariff Act of July 24,

⁴See on the details of treaty-making François S. Jones' article "Treaties and Treaty-making," in the *Political Science Quarterly*, September, 1897.

1897, to negotiate reciprocal trade agreements with foreign governments. He conducted the interviews, prepared the correspondence, which was, however, signed by the Secretary, and signed all the treaties except one, being given "full powers" by the President for the purpose.

Whoever signs a treaty must receive "full powers" from the President. This is a formal document authorizing an individual or individuals to negotiate with the foreign representative for the express purpose of making a treaty for a certain purpose and to sign the treaty. The foreign representative is expected to exhibit a similar document from the head of his state before he signs a treaty. When the final drafts of the treaty have been agreed to by both sides, the treaty is engrossed for final signature, and it is signed in the Secretary of State's office or in the Diplomatic Reception Room. The Chief of the Diplomatic Bureau is present with the papers, the Secretary's seal, unless he uses his signet ring, and the wax. He or an Assistant Secretary holding the American copy of the treaty, compares it with the foreign copy held by the foreign minister or his Secretary of Legation. The two copies being found to be in agreement, both are signed by the Secretary of State and the foreign representative. On the copy intended for the United States the Secretary of State's signature precedes that of the foreign envoy; in that intended for the foreign government the foreign envoy's signature precedes that of the Secretary of State. The seal of each principal is impressed in wax opposite his name. If the treaty is not with an English speaking country, it is written in parallel columns, English on one side, the foreign language on the other. The American copy having been signed, is transmitted to the Senate for ratification with a message from the President. Usually, but not always, the message contains no comment or argument.

Following is an example of the ordinary form:

WASHINGTON, December 6, 1831.

To the Senate of the United States:

I transmit to the Senate, for their advice with regard to its ratification, a treaty between the United States and France, signed at Paris by the Plenipotentiaries of the two Governments on the 4th of July, 1831.

With the treaty are also transmitted the dispatch which accompanied it, and two others on the same subject received since.

ANDREW JACKSON.

Following is another example:

WASHINGTON, February 15, 1893.

To the Senate:

I transmit with a view to its ratification, a treaty of annexation, concluded on the 14th day of February, 1893, between John W. Foster, Secretary of State, and Lorin A. Thurston, W. R. Castle, W. C. Wilder, C. L. Carter, and Joseph Marsden, the Commissioners on the part of the Government of the Hawaiian Islands. The provisional treaty, it will be observed, does not attempt to deal in detail with the questions, &c., &c. [Explaining conditions in the islands and the objects of the treaty.]

When a treaty has been rejected by the Senate it is returned to the Department with a statement of the rejection from the Senate and is filed in the Bureau of Rolls and Library.

The Senate agreeing to the treaty, an attestation of its agreement and of any amendments it may have proposed is attached to the treaty and it is sent back to the President who sends it to the Department. It is then signed by the President, countersigned by the Secretary of State, and the Great Seal affixed, a special warrant for the affixing having been made.

The ratifications are exchanged at the State Department at an appointed time with the foreign representative. He hands the ratified foreign copy to the Secretary of State who hands him the ratified American copy. Each exhibits "full powers" to exchange the ratifications. A protocol or minute of the date and facts of exchange is made. The final completed treaty thus exchanged is engrossed on heavy ledger paper; but in the earlier days was upon parchment or vellum. It is in a rich velvet or leather portfolio which is placed in a handsome wooden box. Until about thirty years ago the Great Seal was appendant, ornamental silk cords passing through the wax which was protected by a round gold box; but since then the seal has been impressed upon the paper itself over a wafer. The appendant seal is still used by European countries, but most American states use the impressed seal.

The form of ratification is:

To all to whom these Presents shall come, Greeting:

Know ye, that whereas a convention between the United States of America and extending for a period of years from concerning was concluded and signed by the respective plenipotentiaries at

Washington, on the day of a true copy of which convention is, word for word, as follows:

[Here follows the convention]

And whereas the Senate of the United States, by their resolution of (two-thirds of the Senators present concurring therein) did advise and consent to the ratification of said convention:

Now, therefore, be it known that I....., President of the United States of America, have seen and considered the said convention, do hereby, in pursuance of the aforesaid advice and consent of the Senate, ratify and confirm the same and every article and clause thereof.

In testimony whereof, I have caused the Seal of the United States of America to be hereunto affixed.

Given under my hand, &c.

[President's signature.]

[SEAL.]

By the President:

[Secretary of State's signature.]

Secretary of State.

The protocol of exchange says:

The undersigned plenipotentiaries having met together for the purpose of exchanging the ratifications of the convention signed at..... January....., 18... between the United States of America and..... for the purpose..... and the ratifications of the convention aforesaid having been carefully compared, and found exactly conformable to each other, the exchange took place this day in the usual form.

In witness whereof, they have signed the present protocol of exchange, and have affixed their seals thereto.

Done at..... this..... day of.....

[Signatures and seals of plenipotentiaries.]

The President then formally proclaims the treaty, the proclamation being prepared by the Diplomatic Bureau, and the treaty is filed in the Bureau of Rolls and Library.

A treaty negotiated by one of our agents abroad is received by the State Department after it has been signed and goes to the Senate in the same manner as if it had been negotiated in this country. The final ratified treaty is sent to the minister and exchanged in the foreign country, in the same way that treaties are exchanged in this country.

The fullest records of treaty negotiations are usually in the case of extradition treaties because of the definitions of legal terms which both parties must agree to.

Extradition, "the act by which one nation delivers up an individual accused or convicted of an offense outside of its own territory" is one of the functions committed to the Secretary of State, as the official charged with the duty of conducting foreign intercourse.⁵ In the earlier days of the republic, this function was not infrequently discharged by the governors of the individual States, in some cases with the approval of the Secretary of State, and in others without consulting him. Some of our States have even gone so far as to enact statutes, conferring on their chief executives the power to deliver up fugitives from justice to foreign nations. But, with the development and clearer comprehension of the powers of the national government, the States have ceased to deal with the subject, and it is now generally admitted to belong exclusively to the Government of the United States. In one case, however, the United States did by treaty agree that applications for extradition might be made and granted by State and Territorial governments. This was the agreement in the treaty of 1861 with Mexico which provided that for offenses committed in the frontier States and Territories of the contracting parties applications for extradition might be made to the State and Territorial governments. The provision has been repeated in the treaty of 1899. It does not preclude the exercise of supreme control in the matter by the national government.

It has been the almost uniform opinion of our constitutional lawyers that extradition can lawfully be granted by the United States only in pursuance of a statute or a treaty; and, as the only Federal legislation on the subject is that which has been adopted to execute our treaties, the government declines to extradite fugitives from justice in the absence of a conventional obligation.

Under similar circumstances it refrains from demanding the surrender of fugitives by other governments. In rare cases, in the absence of a treaty, an appeal has been made to the good will of a foreign government to deliver up a notorious offender. But, as foreign governments are likely to demand a promise of reciprocity in such cases, and as the United States is unable to make such a promise, the appeal must always be attended with much embarrassment, and for that reason has seldom been made.

⁵ See Moore on Extradition, 1891.

The first treaty of this country providing for mutual surrender of criminals was that of 1794 with Great Britain. Murder and forgery were the only crimes included in it, and it expired in twelve years. But, since the conclusion of a new treaty with Great Britain in 1842, treaties have been entered into with many Powers, and the practice of extradition has become general.

The forms of extradition warrants now in use are three: the mandate, called often — although incorrectly — the “warrant of arrest;” the warrant of surrender; and the President’s warrant, authorizing agents to go abroad and bring back surrendered criminals.

The first mandate was issued in 1853, upon application of the British Minister, and was signed by President Franklin Pierce. Prior to that time the persons authorized to apply for the extradition of a criminal went, in the first instance, to the courts. But, owing to doubts suggested by one of our judges as to the regularity of this procedure, a practice grew up of applying to the Secretary of State for a mandate to authorize the institution of judicial proceedings. Although this course was afterwards prescribed by some of our treaties, it is not prescribed in others, and has been held by the Supreme Court to be unnecessary. It is now no longer issued by the Department of State, unless required by treaty. Up to 1860 the mandate was signed by the President, but since then it has been signed by the Secretary of State. The form now used is as follows:

DEPARTMENT OF STATE

To any Justice of the Supreme Court of the United States; any Judge of the Circuit or District Courts of the United States in any District; any Judge of a Court of Record of General Jurisdiction in any State or Territory of the United States, or to any Commissioner specially appointed to execute the provisions of Title LXVI of the Revised Statutes of the United States, for giving effect to certain treaty stipulations between this and foreign Governments, for the apprehension and delivering up of certain offenders.

Whereas, pursuant to existing treaty stipulations between the United States of America [name of the foreign power to which the criminal is to be surrendered] for the mutual delivery of criminals, fugitives from justice in certain cases, [name of the foreign representative making the demand] has made application in due form, to the proper authorities thereof, for the arrest of [name or names of the offender or offenders], charged with the crime of [nature of the crime], and alleged to be [statement of the country from whence the flight was made] and who [“is” or “are”] believed to be within the jurisdiction of the United States.

And whereas, it appears proper that the said [name or names of the offender or offenders] should be apprehended, and the case examined in the mode provided by the laws of the United States aforesaid.

Now, therefore, to the end that the above-named officers, or any of them, may cause the necessary proceedings to be had, in pursuance of said laws, in order that, the evidence of the criminality of the said [name or names of the offender or offenders] may be heard and considered, and, if deemed sufficient to sustain the charge, that the same may be certified, together with a copy of all the proceedings, to the Secretary of State, that a warrant may issue for ["his" or "their"] surrender, pursuant to said treaty stipulations. I certify the facts above recited.

In testimony whereof, I have hereunto signed my name and caused the seal of the Department of State to be affixed.

Done at the City of Washington, thisday of A. D., 1...., and of the Independence of the United States the.....

[SEAL.]

.....,
Secretary of State.

The warrant of surrender has suffered only such alterations as have been made necessary by changes in the law. Like the mandate, it was signed by the President until 1860, since which time it has been signed by the Secretary of State, by whom the law provides that it shall be issued. The form is as follows:

DEPARTMENT OF STATE

To all whom these Presents shall come, Greeting:

Whereas, [name and title of foreign representative making the demand], accredited to this Government, has made requisition in conformity with the provisions of existing treaty stipulations between the United States of America and [name of foreign power] for the mutual delivery of criminals, fugitives from justice in certain cases, for the delivery up of [name or names of offender or offenders], charged with the crime of [nature of crime], committed within the jurisdiction of [name of foreign country where crime was committed].

And whereas, the said [name or names of offender or offenders] ["has" or "have"] been found within the jurisdiction of the United States, and ["has" or "have"], by proper authority and due form of law, been brought before [name of Commissioner or Judge of the United States before whom the examination has been held] for examination upon said charge of [nature of crime.]

And whereas, the said ["Commissioner" or "Judge"] has found and adjudged that the evidence produced against the said [name or names of offender or offenders] is sufficient in law to justify ["his" or "their"] commitment upon the said charge, and has, therefore, ordered that the said [name or names of offender or offenders] be committed pursuant to the provisions of said treaty stipulations.

Now, therefore, pursuant to the provisions of Section 5272 of the Revised Statutes of the United States, These Presents are to require the United States Marshal for the [statement of the district or State], or any other public officer or person having

charge or custody of the aforesaid [name or names of the offender or offenders], to surrender and deliver ["him" or "them"] up to such person or persons as may be duly authorized by the Government of [name of foreign power] to receive the said [name or names of offender or offenders] to be tried for the crime of which ["he is" or "they are"] so accused.

In testimony whereof, I have hereunto signed my name and caused the seal of the Department of State to be affixed.

Done at the City of Washington, this.....day of....., A. D., 19.., and of the Independence of the United States the.....

[SEAL.]

.....
Secretary of State.

The President's warrant, authorizing an officer of the United States to take a fugitive into custody and bring him back to the United States for trial, is issued in the following form:

[President's name],
President of the United States of America.
To [officer to take the offender into custody].

Whereas, it appears by information in due form by me received, that [name or names of offender or offenders], charged with the crime of [nature of crime], fugitive from the justice of the United States, [whence fled].

And whereas, application has been made to the [what foreign authorities] for the extradition of said fugitive, in compliance with existing treaty stipulations between the United States of America and [name of foreign power].

And whereas, it is understood that, in compliance with such application, the necessary warrant is ready to be issued by the authorities aforesaid for the delivery of the above-named fugitive into the custody of such person or persons as may be duly authorized to receive the said fugitive and bring ["him" or "them"] back to the United States for trial.

Now, therefore, you are hereby authorized and empowered, in virtue of the stipulations aforesaid, and in execution thereof, to receive the said [name or names of offender or offenders] as aforesaid, and to take and hold ["him" or "them"] in your custody, and conduct ["him" or "them"] from such place of delivery [to what country the flight has been made], by the most direct and convenient means of transportation, to and into the United States, there to surrender the said [name or names of offender or offenders] to the proper authorities of the [name of the State making the request].

For all of which these Presents shall be your sufficient warrant.

In testimony whereof, I have hereunto signed my name and caused the seal of the United States to be affixed.

Done at the city of Washington this.....day of....., A. D., 18.., and of the Independence of the United States the one hundred and.....

[SEAL.]

By the President:

.....
Secretary of State.

The forms quoted above have been printed for the past twenty-six years. Prior to that the warrants were written out. Before leaving the Department the extradition warrants are recorded in three books, entitled, variously, "Warrants of Arrest," "Warrants of Surrender," and "President's Warrants." These date back only to 1862, the warrants before that time being recorded in the volumes of pardons issued by the Department.

The instructions on the subject of extradition are embodied in the following circular.

MEMORANDUM RELATIVE TO APPLICATIONS FOR THE EXTRADITION FROM FOREIGN COUNTRIES OF FUGITIVES FROM JUSTICE

DEPARTMENT OF STATE,

WASHINGTON, October, 1892.

Extradition will only be asked from a government with which the United States has an extradition treaty, and only for an offense specified in the treaty.

All applications for requisitions should be addressed to the Secretary of State, accompanied by the necessary papers as herein stated.* When extradition is sought for an offense within the jurisdiction of the State or Territorial courts, the application must come from the Governor of the State or Territory. When the offense is against the United States, the application should come from the Attorney-General.

In every application for a requisition it must be made to appear that one of the offenses enumerated in the extradition treaty between the United States and the government from which extradition is sought has been committed within the jurisdiction of the United States, or of some one of the States or Territories, and that the person charged therewith is believed to have sought an asylum or has been found within the dominions of such foreign government.

The extradition treaties of the United States ordinarily provide that the surrender of a fugitive shall only be granted upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her commitment for trial if the crime or offense had been there committed.

If the person whose extradition is desired has been convicted of a crime or offense and escaped thereafter, a duly authenticated copy of the record of conviction and sentence of the court is ordinarily sufficient.

If the fugitive has not been convicted, but is merely charged with crime, a duly authenticated copy of the indictment or information, if any, and of the warrant of arrest and return thereto, accompanied by a copy of the evidence upon which the indictment was found, or the warrant of arrest issued, or by original depositions set-

*The only exception is found in the treaty with Mexico, under which, in the case of crimes committed in the frontier States or Territories, requisitions may be made directly by the proper authorities of the State or Territory. (Article 2, treaty with Mexico, concluded December 11, 1861.)

ting forth as fully as possible the circumstances of the crime, are usually necessary. Many of our treaties require the production of a duly authenticated copy of the warrant of arrest in this country; but an indictment, information, or warrant of arrest alone, without the accompanying proofs, is not ordinarily sufficient. It is desirable to make out as strong a case as possible, in order to meet the contingencies of the local requirements at the place of arrest.

If the extradition of the fugitive is sought for several offenses copies of the several convictions, indictments, or informations, and of the documents in support of each should be furnished.

Application for the extradition of a fugitive should state his full name, if known, and his alias, if any, the offense or offenses, in the language of the treaty, upon which his extradition is desired, and the full name of the person proposed for designation by the President to receive and convey the prisoner to the United States.

As the application proper is desired solely by the Department as a basis for its action, and is retained by it, it is not necessary that it should be attached to the evidence.

Copies of the record of conviction, or of the indictment, or information, and of the warrant of arrest, and the other papers and documents going to make up the evidence are required by the Department, in the first instance, as a basis for requesting the surrender of the fugitive, but chiefly in order that they may be duly authenticated under the seal of the Department, so as to make them receivable as evidence where the fugitive is arrested, upon the question of his surrender.

Copies of all papers going to make up the evidence, transmitted as herein required, including the record of conviction, or the indictment, or information, and the warrant of arrest, must be duly certified and then authenticated under the great seal of the State making the application or the seal of the Department of Justice, as the case may be; and this Department will authenticate the seal of the State or of the Department of Justice. For example, if a deposition is made before a justice of the peace, the official character of the justice and his authority to administer oaths should be attested by the county clerk or other superior certifying officer; the certificate of the county clerk should be authenticated by the Governor or Secretary of State under the seal of the State, and the latter will be authenticated by this Department. If there is but one authentication, it should plainly cover all the papers attached.

All of the papers herein required in the way of evidence must be transmitted in duplicate, one copy to be retained in the files of the Department, and the other, duly authenticated by the Secretary of State, will be returned with the President's warrant, for the use of the agent who may be designated to receive the fugitive. As the Governor of the State, or the Department of Justice, also ordinarily requires a copy, prosecuting attorneys should have all papers made in triplicate.

By the practice of some of the countries with which the United States has treaties, in order to entitle copies of depositions to be received in evidence the party producing them is required to declare under oath that they are true copies of the original depositions. It is desirable, therefore, that such agent, either from a comparison of the copies with the originals, or from having been present at the attestations of the copies, should be prepared to make such declaration. When the original depositions are forwarded, such declaration is not required.

Applications by telegraph or letter are frequently made to this Department for

its intervention to obtain the provisional arrest and detention of fugitives in foreign countries, in advance of the presentation of the formal proofs upon which a demand for their extradition may be based. Such applications should state specifically the name of the fugitive, the offense with which he is charged, the circumstances of the crime as fully as possible, and a description and identification of the accused. It is always helpful to show that an indictment has been found or a warrant of arrest has been issued for the apprehension of the accused. In Great Britain the practice makes it essential that it shall appear that a warrant of arrest has been issued in this country.

Care should be taken to observe the provisions of the particular treaty under which extradition is sought, and to comply with any special provisions contained therein. The extradition treaties of the United States may be found in the several volumes of the Statutes at Large, in the "Revised Statutes of the United States, relating to the District of Columbia and Post Roads, together with Public Treaties in force on the 1st day of December, 1873," and in the volume of Public Treaties, 1887. Copies of individual treaties will be furnished by the Department upon application.

If the offense charged be a violation of a law of a State or Territory, the agent authorized by the President to receive the fugitive will be required to deliver him to the authorities of such State or Territory. If the offense charged be a violation of a law of the United States, the agent will be required to deliver the fugitive to the proper authorities of the United States for the judicial district having jurisdiction of the offense.

Where the requisition is made for an offense against the laws of a State or Territory, the expenses attending the apprehension and delivery of the fugitive must be borne by such State or Territory. Expenses of extradition are defrayed by the United States only when the offense is against its own laws.

A strict compliance with these requirements may save much delay and expense to the party seeking the extradition of a fugitive criminal.

Special detailed instructions for extraditions from Mexico were issued, April 10, 1900, and for Great Britain, May, 1890.

The last instruction was:

DEPARTMENT OF STATE
WASHINGTON, JUNE 4, 1906.

His Excellency

The Governor of

Sir:

In view of certain irregularities which have sometimes occurred in connection with the return to the United States from foreign countries of fugitives from justice, applications for extradition of such fugitives which are addressed to the Secretary of State should hereafter state that such application is made solely for the purpose or purposes expressed therein, and not for the purpose of enforcing the collection of a debt, or of avoiding the penalty of a bail bond, or for any private purpose whatever, and that if the application be granted the criminal proceedings shall not be used for any

of said purposes. A form of certificate is hereto subjoined, and a separate blank for your use is enclosed.

I have the honor to be, Sir,

Your obedient servant,

ROBERT BACON,

Acting Secretary

CERTIFICATE

I, _____, Governor of _____, do hereby certify that the accompanying application presented by me on behalf of the _____ of _____, for the extradition of _____ from _____, is made solely for the purpose of securing his trial and punishment for the offense of _____ and not in order to enforce the collection of a debt, or to avoid the penalty of a bail bond, or for any private purpose whatever, and that if the application be granted the criminal proceedings shall not be used for any of said purposes.

Governor of _____

The entire management of extradition questions belongs immediately to the Solicitor's Office. The warrants are prepared by the Bureau of Appointments on his order and the papers are filed in the Index Bureau, which has in its custody the great body of the Department's records.

Undoubtedly the most difficult task in the Department's internal administration has been to find a satisfactory system of indexing, filing and recording its correspondence. Old correspondence is more often used in current negotiations in this Department than in any other. Only a few months ago the most conspicuous international question before the people involved the construction of a treaty made with Russia in 1832, and the history of the treaty extends back of that date. Twenty months ago the fisheries question with Great Britain was arbitrated at The Hague. It goes back to a period before American independence. It is, therefore, necessary for the efficient conduct of the Department's business that all of its correspondence be preserved no matter how old it may be, and that it be accessible for present day purposes.

Although the arrangement of 1833 made the Bureau of Archives, Laws and Commissions,⁶ all the archives of the Department were not then concentrated in that bureau, the diplomatic archives being under the Diplomatic Bureau and the consular under the Consular Bureau.

⁶ VI, I, 608.

The miscellaneous archives passed sometime after 1833 to the keeping of the Librarian of the Department; then under Secretary Fish's arrangement of 1870 to the Chief Clerk's Bureau; then in 1874 to the Bureau of Indexes and Archives. That bureau took over at the same time the diplomatic and consular archives. It did not take the applications for office, which remained, where they now are, in the Commission or Appointment Bureau, nor the passport applications and correspondence which remained where they now are in the Passport or Citizenship Bureau.

The diplomatic and consular archives have been divided from the beginning into two general classes, instructions to diplomatic and consular agents and despatches from them, the former being recorded in books, the latter bound in large volumes. The diplomatic instructions were recorded in chronological order, all countries being together, until 1833, since which date each country has had a separate series of record books.⁷ The record books had an index from 1789 to 1870 in the front of each book; after 1870 all the indexing was in separate folio books, one for diplomatic incoming communications, one for diplomatic outgoing mail, and the same system for consular and miscellaneous communications, making six index books in all. The indexes to the despatches to the Department from diplomatic and consular officers were in separate volumes up to 1870. The notes from the Department to foreign ministers were recorded with the domestic correspondence from 1789 to 1804; then in volumes by themselves, all countries being together up to 1834, and since then each country has had a separate series of record books. They were indexed in the front of each volume till 1870. The notes from foreign ministers to the Secretary of State have always been bound by countries, but there were no indexes from 1789 to 1828; then they were indexed with the despatches until 1870. Instructions to consuls from 1789 to 1800 were recorded among the domestic letters; since then they have had separate record books and the indexing has been on very much the same system as the diplomatic correspondence. The miscellaneous archives are divided into domestic letters, miscellaneous volumes, and miscellaneous papers. The Domestic Letters are the recorded letters from the Department, the first four volumes from

⁷ Inventory of Archives (Confidential) 1897.

1784 to 1792 being called American Letters; thereafter the existing nomenclature has been employed. Up to 1870 each volume contained a general index of persons to whom the letters were written and there were separate index books for some periods until 1870. The Miscellaneous Letters are the domestic letters to the Department, all bound chronologically with indexes made of recent years, that from 1789 to 1820 being printed by the Department for confidential use in 1897. There were also indexes for scattered periods up to 1870.

The Report Books are recorded letters from the Department or the President to the Senate or House of Representatives on Department subjects beginning with 1790. Up to 1870 each volume had its index; since then they are indexed as part of the miscellaneous correspondence. The miscellaneous volumes include papers pertaining to claims, international congresses, arbitration, Territorial papers, reports from special agents, international expositions, reports of commissions, etc. The miscellaneous papers are archives of the same character in packages not bound.

The establishment of the folio index books in 1870 centralizing the indexing of the correspondence, followed by the concentration of the archives themselves in 1874, marked an important development in Department system. The system then inaugurated continued in use for thirty-five years, but as the correspondence increased in volume it was found to be insufficient, mainly because of the difficulty of bringing together all the papers, diplomatic, consular and miscellaneous, which pertained to a given subject. Accordingly, under Secretary Root's order in 1909, a new system of numerical subjective filing, somewhat on the order of a modern library system of classification, was inaugurated. It was modified the following year and brought to further perfection. The explanation by John R. Buck, Chief of the Bureau of Indexes and Archives, printed for the Department's use, is as follows:

The present classification of the correspondence of record in the Bureau of Indexes and Archives is so devised that the arrangement of the file itself serves the general purposes of a subject index. Conversely, the subject-matter of a given paper determines the filing place of the paper and therefore its file number.

The nine primary classes of the file are:

Class 0. General.

Class 1. Administration, Government of the United States.

- Class 2. Extradition.
- Class 3. Protection of Interests.
- Class 4. Claims.
- Class 5. International Congresses and Conferences. International Treaties.
- Class 6. Commerce. Commercial Relations.
- Class 7. Political Relations of States.
- Class 8. Internal Affairs of States.

Each of these classes is divided, according to the decimal system, until each distinct subject has its own file number. This file number consists of at least three figures and a decimal point, the point always following the third figure, save that where a letter is appended to the third figure the point is placed after the letter. In every class except 5 correspondence is arranged, to a greater or less extent, according to the country concerned, as per table appended to the classification, wherein all independent countries and many smaller political divisions have their respective numbers, each consisting of two figures or two figures and one letter.

The indication for the insertion of a country number is the occurrence in the classification of two stars or daggers, and the significance of these marks on the respective pages of the classification is appropriately explained.

A similar table, likewise appended to the classification, assigns a three-figure number to each principal consular office of the United States, space being left for the inclusion of offices hereafter to be established. A consulate number is indicated by three stars.

CLASS 0. GENERAL. MISCELLANEOUS

In this class appear matters which apply to the files and records of the Bureau in general, as inventories and press-copy books; matters of an ephemeral nature, and therefore not worthy of more particular classification; and some divisions which touch on the subject-matter of two or more of the succeeding classes but are more conveniently arranged by themselves.

CLASS 1. ADMINISTRATION, GOVERNMENT OF THE UNITED STATES

This class comprises matters pertaining to the Government of the United States of a nature requiring further elaboration than is feasible in the succeeding classes, in which theoretically they belong. Thus, Citizenship of the United States (811.012) becomes a division of Class 1, as 130. Documentation of merchandise under United States customs laws (611.0023) becomes 140 in Class 1.

CLASS 2. EXTRADITION

Extradition cases are arranged by countries. The country number immediately following the class number indicates the country from which rendition is sought. After the decimal point appears the number of the demanding country. Thus, under 212.11 are found all cases of extradition from Mexico to the United States. Inversely, 211.12 includes all cases from the United States to Mexico. Under each such number individual cases are arranged alphabetically.

For convenience this class includes also cases in which prosecution of a person in

one country for crime committed in another is proposed or requested. In these cases the number of the former country precedes the decimal point and that of the latter follows a zero after the point. Thus, 265.011 would signify prosecutions in Italy (in lieu of extradition) of persons charged with crimes committed in the United States.

CLASS 3. PROTECTION OF INTERESTS

Class 3 covers private interests in general and their protection. Immediately after the class number comes the number of the country in which the interest is jeopardized or in which protection is sought. After the decimal point comes the country number of the nationality of the interest.

The sixth figure of the file number indicates the general category in which the case in question falls. Further arrangement is made alphabetically under the name of the party in interest.

Correspondence looking to the procurement of a concession or permit to do business in a country belongs in Class 8 rather than Class 3. Thus, the application of an American life-insurance company for a license to operate in a foreign country is classified as 8**.506.

CLASS 4. CLAIMS

The arrangement of this class is similar to that of Class 2, Extradition, the number of the country against which the claim is made following the class number, while the country number after the point indicates the nationality of the claim. All claims falling into each such division are arranged alphabetically under the name of the claimant.

A special arrangement is here made for those categories of claims which, originally lying against another government, are ultimately assumed by the government of the nationality of the claim, as against itself; thus: French Spoliation Claims, 411.051; Spanish Treaty Claims, 411.052.

CLASS 5. INTERNATIONAL CONGRESSES AND CONFERENCES. INTERNATIONAL TREATIES

In this class are grouped matters of common interest to the governments or the people of several countries, whether forming the subject of treaty engagements or not. Exception, however, is made of conferences, etc., particularly affecting the affairs of a single state, as the Algeciras Conference of 1905, which is classed with political affairs in Morocco.

The arrangement of this class for convenience is made to correspond to the arrangement of Class 8, since the ground covered is substantially the same. A few special numbers are provided, however, at the beginning of the class for broad questions of international relations

CLASS 6. COMMERCE. COMMERCIAL RELATIONS

This class treats of the trade of a country, its customs administration, import and export duties, export bounties, pure-food laws, etc., and their bearing on the commerce of other countries.

The country number immediately following the class number is invariably that of the importing country; that after the decimal point the exporting country; thus:

- 641.00 Imports of Great Britain.
- 641.11 { Imports of Great Britain from the United States.
- Exports of the United States to Great Britain.
- 600.11 Exports of the United States.

The sixth digit of the file number indicates: 1, general conditions affecting commerce, divided as between import and export trade; 2, 3, 4, 5, and 6, laws and regulations of the importing country; 7, 8, and 9, laws, etc., of the exporting country; thus:

- 662.003 German import tariff.
- 662.113 German import tariff in its application to American commerce.
- 611.514 Food and drugs act of the United States, as applied to imports from France.
- 600.618. Export bounties granted by Russia.

The subject of commercial relations is made subordinate to that of customs, tariffs; thus:

- 611.6231 Commercial relations between the United States and Germany.

CLASS 7. POLITICAL RELATIONS OF STATES

Class 7 comprises international relations, diplomatic and consular representation, etc. While most treaties and conventions are included therein, exceptions are made, as the following:

- Extradition treaties, Class 2.
- Claims conventions, Class 4.
- International treaties, Class 5.
- Tariff convention, Class 6.
- Postal conventions, Class 8

The subdivision 701 deals with diplomatic representation. Immunities, etc., come under 701.01 to 701.09. The number 701.** indicates the diplomatic service of a country, 701.** †† its mission near the Government of the country ††, while the body of foreign representatives (diplomatic corps) in a country is indicated by the number 701.00 ††.

Under 702 is similarly treated the subject of consular representation.

The exercise of good offices by the legation of the United States on behalf of the interests of France (51) in Venezuela (31) would be indicated by the number 704.5131.

The broad relations of one state with another are indicated by the two country numbers following the class number, 7, the smaller number preceding and the greater following the decimal point; thus:

- 761.93 Relations between Russia and China.

CLASS 8. INTERNAL AFFAIRS OF STATES

This class, with a few exceptions, is confined to purely internal matters.

In Class 8, where two country numbers are used in a single file number, the smaller number precedes the greater, except where another order is specified.⁸

While the Index Bureau has the main body of Department archives, certain historical archives have from time to time been deposited in the Library.

[The next section, which will conclude the series, will be devoted to the duties of the Department and the buildings it has occupied.]

GAILLARD HUNT.

⁸Classification of Correspondence, 1911.

BOARD OF EDITORS OF THE AMERICAN JOURNAL
OF INTERNATIONAL LAW

CHANDLER P. ANDERSON, Washington, D. C.
CHARLES NOBLE GREGORY, George Washington University.
AMOS S. HERSHEY, Indiana University.
CHARLES CHENEY HYDE, Northwestern University.
GEORGE W. KIRCHWEY, Columbia University.
ROBERT LANSING, Watertown, N. Y.
JOHN BASSETT MOORE, Columbia University.
GEORGE G. WILSON, Harvard University.
THEODORE S. WOOLSEY, Yale University.

Editor in Chief

JAMES BROWN SCOTT, Carnegie Endowment for International Peace,
Washington, D. C.

Business Manager

GEORGE A. FINCH, 2 Jackson Place, Washington, D. C.

EDITORIAL COMMENT

FRENCH PROTECTORATE ESTABLISHED IN MOROCCO¹

The editorial comment on the Moroccan situation, which appeared in the April number of the JOURNAL, endeavored to show the steps by which the choice portions of Northern Africa had been appropriated by France and Great Britain, and to explain the attitude of the Powers toward the further extension of French influence. The opposition of Germany to a French protectorate over Morocco was overcome after long and delicate negotiations, and a convention, in which Germany specifically waived objections to the political projects of France, provided the door was not closed to commercial equality, was signed on

¹ In this brief comment a single aspect has been considered. The question as a whole is too important to be discussed summarily. An article will appear in a future number of the JOURNAL, which will examine the question in all its bearings.

November 4, 1911, approved by the legislatures of both countries, and ratifications of the declaration were formally exchanged. It was pointed out that Spanish interests were involved and that Spain would have to be reckoned with before the French plans could be carried out, even supposing Morocco would consent or had consented in advance to French domination. Negotiations are in progress between France and Spain, but it is understood that an agreement has not yet been reached.

The case, however, is otherwise with Morocco, for on March 30, 1912, a treaty was signed between France and Morocco, by which the latter consented to the establishment of a French protectorate.² So far as the international status created by this treaty is concerned, Articles V and VI need only be consulted. Article V provides that France shall be represented by a resident commissioner general, who shall supervise the execution of the present agreement. This would not necessarily amount to the establishment of a protectorate, because France could be represented by a diplomatic agent or a consul general, and this official would properly represent the interests of his government under the present treaty, as well as in all other questions between the two governments. The name is, however, ominous, because a resident commissioner general suggests at once functions other than those performed by an ordinary diplomatic agent. The matter, however, is not left in doubt. The resident commissioner general is declared to be the sole intermediary of the sultanate with foreign representatives and in the relations which these representatives maintain with the Moroccan Government. He is especially authorized to take charge of all the questions concerning foreigners in Morocco. The sultan still remains sultan, but he is henceforth to be represented by the French commissioner general so far as foreigners within Morocco are concerned, and this official is designated as the sole channel of communication between foreign representatives and the Moroccan Government.

If the treaty stopped here, it might perhaps be maintained that the commissioner general is merely the organ or agent of the sultan for certain clearly defined cases, but the concluding paragraph of the fifth article authorizes the commissioner general "to approve and to promulgate in the name of the French Government all decrees rendered by his Shereefian Majesty." That is to say, the commissioner general not merely acts as an intermediary between the representatives of foreign Powers and the sultanate, but his approval of its proposed decrees is requisite,

² Printed in SUPPLEMENT, p. 207.

and the decrees themselves, when approved, are to be promulgated, not in the name of the sultan, but in the name of the French Government. Without further argument, it seems clear that the judgment of France is henceforth substituted for the judgment of the sultan, and the control of Morocco passes from its native authorities to the duly accredited representative of France. In view of the express provisions of this article, it would appear to be correct to say that the Moroccan Government is the agent of France, rather than that the latter Power is the agent of Morocco in carrying on the government.

So far the question has been considered from the international standpoint. Article VI deals with the international status and representation of Morocco and provides that the French diplomatic and consular agents shall represent as well as protect Moroccan subjects and interests in foreign parts. In this first clause of the article the rights of France are stated in the affirmative, for Morocco specifically invests French diplomatic and consular agents with the power of representation. It would seem to follow from this that Morocco renounces the right of individual representation, but the negotiators were apparently unwilling to leave a loophole for interpretation. Therefore, the final paragraph of the article states the case specifically by providing that the sultan shall not perform any act of an international character "without the previous assent of the Government of the French Republic." That is to say, France is affirmatively invested with the power to represent Morocco in its foreign relations and Morocco expressly binds itself not to perform an international act without the consent of France. It may be maintained that France is merely the agent of the Moroccan Government in international affairs, but, if this view be correct, France is nevertheless the sole agent, and the express renunciation would seem to be a surrender of power rather than an authorization to act as agent in its exercise.

It may be said that the treaty does not question the independent existence of Morocco, in the sense that it is not annexed as a province or department. Its territorial existence is to be maintained; the sultan is to be protected as the ruler of Morocco and his rights as such are recognized; but from the international standpoint, Morocco has lost both its independence and equality, and is no longer, it would appear, entitled to full membership in the society of nations. In international law, France is the sovereign of Morocco, although in constitutional law Morocco continues to exist, but even within this sphere France is explicitly created the agent of the Moroccan Government for certain

clearly specified purposes, and the will of the agent rather than the will of the sultan is to prevail.

THE BRAZILIAN COFFEE CASE

In a very important case, involving 950,000 bags of coffee, claimed to be the property of the State of San Paulo of the Republic of Brazil, the United States prayed, in its petition under the Sherman Anti-Trust Act, for an injunction, refused by the District Court for the Southern District of New York, for "an immediate seizure of all coffee now in the possession of the warehouse company belonging to the State of San Paulo, Brazil," in order to turn it over "to a receiver to be appointed by the court, with instructions to sell it from time to time as the court might direct." This particular form of relief was disclaimed on the argument. The temporary relief which the bill asks for, to quote the language of the court, "is an injunction (continued till final hearing on decree) which will finally impound this coffee so that the owner can not sell it to anybody in this country at any price, can not ship it abroad and sell it there, should a satisfactory price be obtainable, and can not even return it to the place whence it came."

In denying the temporary relief, Circuit Justice Lacombe, speaking for the court, said:

No provision is proffered for making good to the owner any loss it might sustain in consequence of such impounding of the property, should the plaintiff fail to make good its contentions on final hearing, probably many months hence.

The numerous issues of fact and law, which have been referred to on the hearing, present important questions and contain too many elements of uncertainty to be decided summarily in advance of the trial. They may with greater propriety be disposed of when the testimony shall disclose the exact facts.

We are not persuaded by anything in the papers submitted that there is any reason to apprehend that in the interim there will be such changes in the situation as will injuriously affect the position of the government.

For these reasons the preliminary injunction prayed for by the government was denied.

The petition of the government sets forth that 950,000 bags of coffee were "purchased by the agents of the State of San Paulo," most of which is held "elsewhere than in the United States." It sets up the fact that the defendant, one Herman Sielcken, is a resident of the Southern District of New York; that he is the agent of the committee formed to

purchase and to control the coffee of the State of San Paulo; and that he has in his possession and control in the warehouse of the New York Dock Company on Long Island the coffee shipped to the United States under the directions of the foreign committee, of which he is a member. It is charged by the government that the action of the committee in purchasing large quantities of coffee outside of the United States and selling in New York the portion of the coffee allotted to the United States constitutes a conspiracy under the Anti-Trust Law of 1890, and prays for an injunction, as briefly stated in the decision of the court already quoted.

In this statement of the case there are two points of very considerable interest to international lawyers. First, whether the provisions of the Anti-Trust Act of July 2, 1890, apply to transactions which have taken place outside of the jurisdiction of the United States; and second, whether property in the United States admitted to belong to a foreign government, or its agents, can properly be made the object of legal proceedings. It is admitted in the petition that the purchase of the coffee and its storing by the committee, in order to regulate its price, is not illegal by the laws of Brazil (Petition of the United States, p. 31). It is maintained, however, that the execution in the United States of the agreement constitutes a conspiracy under the Act of July 2, 1890. The applicability of the Anti-Trust Act, so as to make the transactions, which admittedly took place in Brazil, a conspiracy under the provisions of the Sherman Act, has been passed upon by the Supreme Court of the United States in the *American Banana Company v. United Fruit Company* (213 U. S. 348), the head-note to which reads:

While a country may treat some relations between its own citizens as governed by its own law in regions subject to no sovereign, like the high seas, or to no law recognized as adequate, the general rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where it is done; that a statute will, as a general rule, be construed as intended to be confined in its operation and effect to the territorial limits within the jurisdiction of the lawmaker, and words of universal scope will be construed as meaning only those subject to the legislation; that the prohibition of the Sherman Anti-Trust law does not extend to acts done in foreign countries, even though done by citizens of the United States and injuriously affecting other citizens of the United States; that sovereignty means that the decree of the sovereign makes law and foreign courts cannot condemn the influences persuading the sovereign to make the decree; and that a conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful if they are permitted by the local law.

The decision in this case is so important as to justify quotation from the opinion of the court. Thus it is said:

The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.

And the court states this and other considerations as leading in case of doubt "to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power." All legislation is *prima facie* territorial. Words having universal scope, such as 'Every contract in restraint of trade,' 'Every person who shall monopolize,' etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue. We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned.

For again, not only were the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place, and therefore were not torts at all, however contrary to the ethical and economic postulates of that statute. The substance of the complaint is that, the plantation being within the *de facto* jurisdiction of Costa Rica, that state took and keeps possession of it by virtue of its sovereign power. But a seizure by a state is not a thing that can be complained of elsewhere in the courts. The fact, if it be one, that *de jure* the estate is in Panama does not matter in the least; sovereignty is pure fact. The fundamental reason why persuading a sovereign power to do this or that cannot be a tort is not that the sovereign cannot be joined as a defendant or because it must be assumed to be acting lawfully. The fundamental reason is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law.

It seems to be evident, therefore, that, whether or not the actions of San Paulo would constitute a conspiracy under the Sherman Act, if the same acts had been consummated in the United States, the Sherman Act can not be extended beyond the jurisdiction of the United States so as to make unlawful according to its provisions what was lawful according to the laws of Brazil. Whether or not the 950,000 bags of coffee, or any part thereof within the United States, can be seized or sold, would seem to depend upon the question whether or not property in the United States belonging to a foreign state is subject to judicial process within the United States. It is a familiar doctrine of international law

that a foreign state or sovereign can not be sued without its or his consent, and that property belonging to the sovereign is likewise exempt from suit, even although such property may be engaged in trade. (*De Haber v. Queen of Portugal*, 1851, 17 Queen's Bench, 196; *Vavasour v. Krupp*, 1878, L. R. 9, Chancery Div. 351; *Le Parlement Belge*, 1878, L. R. 5, Probate Div. 197.)

In the case of the *Parlement Belge*, it was insisted that the immunity from suit was lost by having been used for trading purposes, upon which the court said:

As to this, it must be maintained either that the ship has been so used as to have been employed substantially as a mere trading ship and not substantially for national purposes, or that a use of her in part for trading purposes takes away the immunity, although she is in possession of the sovereign authority by the hands of commissioned officers, and is substantially in use for national purposes. Both these propositions raise the question of how the ship must be considered to have been employed.

As to the first, the ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign, and to be a public vessel of the state. It seems very difficult to say that any court can inquire by contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war, that declaration cannot be inquired into. That was expressly decided under very trying circumstances in the case of the *Exchange*. Whether the ship is a public ship used for national purposes seems to come within the same rule. But if such an inquiry could properly be instituted it seems clear that in the present case the ship has been mainly used for the purpose of carrying the mails, and only subserviently to that main object for the purposes of trade. The carrying of passengers and merchandise has been subordinated to the duty of carrying the mails. The ship is not, in fact, brought within the first proposition. As to the second, it has been frequently stated that an independent sovereign cannot be personally sued, although he has carried on a private trading adventure. It has been held that an ambassador cannot be personally sued, although he has traded; and in both cases because such a suit would be inconsistent with the independence and equality of the state which he represents. If the remedy sought by an action *in rem* against public property is, as we think it is, an indirect mode of exercising the authority of the court against the owner of the property, then the attempt to exercise such an authority is an attempt inconsistent with the independence and equality of the state which is represented by such owner. The property cannot, upon the hypothesis, be denied to be public property; the case is within the terms of the rule; it is within the spirit of the rule; therefore, we are of opinion that the mere fact of the ship being used subordinately and partially for trading purposes does not take away the general immunity. For all these reasons, we are unable to agree with the learned judge, and have come to the conclusion that the judgment must be reversed.

The case of the *Exchange* (1812, 7 Cranch, 116), referred to in the portion of the judgment just quoted, is universally considered as the leading authority on the immunity from suit of property belonging to sovereigns. The opinion of Chief Justice Marshall in this case is too well known to justify quotation, and it is believed that its reasoning, coupled with the judgments in the cases previously cited, forbids interference through judicial process with property belonging to a foreign state, and the coffee in question is stated by the court to belong to a foreign state.

The theory and practice of nations do not go to the extent of rendering sovereigns unaccountable for their actions in withdrawing them from the jurisdiction of courts of justice. The channels of diplomacy are open, though the courts be closed, as was admirably stated by Mr. Pinkney *arguendo* in the case of the *Exchange*. Thus he said, "When wrongs are inflicted by one nation upon another in tempestuous times, they cannot be redressed by the judicial department. Its powers cannot extend beyond the territorial jurisdiction. * * * The right to demand redress belongs to the executive department, which alone represents the sovereignty of the nation in its intercourse with other nations."

The final decision of the District Court upon trial of the case of the *United States of America v. Herman Sielcken, et al.*, will be looked upon with more than common interest, for, unless precedents are rejected, or the circumstances of the present case are distinguished from them, the success of the government would seem to be inconsistent with hitherto recognized principles of international law.

THE CLOSING AND REOPENING OF THE DARDANELLES

The recent action of Turkey in closing, and then after a short period, reopening the Dardanelles, recalls the somewhat anomalous position which those straits occupy in international law. The Dardanelles and the Bosphorus are Turkish territorial straits. The condition required to constitute territorial straits is that they shall be sufficiently narrow that navigation through them can be controlled by coast batteries erected either on one or both sides of them, and that the territory on both sides of them shall belong to the same country. They connect the Mediterranean Sea, about which there has never been any question as to its international character, and the Black Sea, which has only within the last century and a half become international.

In 1774, through the intervention of Russia, the Crimea secured its independence of Turkey, and the Black Sea ceased to be a territorial sea. In the same year Russia obtained from Turkey, by treaty, the right to free navigation through the Dardanelles, and similar privileges were soon secured by other Powers. Turkey, however, never recognized the right of foreign vessels of war to have passage through the straits. In 1841 the rule as to the exclusion of foreign vessels of war from the Dardanelles was accepted by the Powers, and again in 1856, by a separate convention of March 30, the traditional right asserted by Turkey was recognized by the Powers signatory of the Treaty of Paris. Again in 1871 the rule was confirmed by the Treaty of London. The United States was not a party to this treaty, and refused to recognize the claim of Turkey "as a right under the law of nations." It has, however, been deemed expedient by the United States to acquiesce in the exclusion of vessels of war from the Dardanelles until the proper occasion should arise to dispute the claim of Turkey.

The rule of international law with respect to territorial waters which are so placed that passage through them is necessary or convenient for the navigation of the open seas, is that they are subject to the right of innocent use by all nations for purposes of commercial intercourse. They are not, however, thereby thrown open to the passage of vessels of war. The state within whose dominion they lie, or whose shores they border, is not necessarily bound to permit the passage of vessels of war through them. The reason for the exception of vessels of war is founded on the right of a state that its peace and security shall not be threatened by the presence of war vessels so near to its territories.

It would seem, however, that while we must thus admit the abstract right of a state to exclude foreign vessels of war from even the innocent use of its territorial water, in so far as such vessels are a menace to its peace, it is hardly in accord with the friendly intercourse of nations, that a state which is in possession of a territorial strait, such as the Dardanelles, should, as a general and permanent rule, exclude foreign vessels of war from the right of innocent passage in time of peace through the strait. In this respect, the guarantee of the Powers, by the Treaty of London, that Turkey may permanently exclude foreign vessels of war from the Dardanelles would seem to be introducing a rule not in accord with international custom under conditions substantially similar.

On April 18 last, Italy, in pursuance of her policy of extending the war nearer to the center of the Turkish Empire, began the bombard-

ment of the Dardanelles. In response to the Italian attack, floating mines were set adrift by Turkey in the straits and all commercial navigation was thereupon suspended. Neutral commerce immediately felt the effect of the closure. On April 29, as many as ninety-nine foreign merchantmen were detained at the port of Constantinople and in neighboring waters. The value of their cargoes was put at between fifteen and twenty million dollars, and their detention caused a loss to the underwriters estimated at over fifteen thousand dollars a day. In response to the inquiries of the foreign ambassadors and ministers at Constantinople, the Turkish Government replied that although it was anxious to avoid inflicting injury upon the interests of neutrals, at the same time it could not undertake the removal of the mines without weakening the defenses of the Dardanelles, which were all the more important, inasmuch as Italy had cut off communication by cable with the *Ægean* archipelago, thus making it impossible for Turkey to obtain timely warning of an intended Italian attack. The Turkish Government insisted upon obtaining guarantees from the Powers for the security of the Dardanelles against further attack on the part of Italy.

In spite, however, of its inability to obtain the required guarantees, the Turkish Government decided on May 1st, to reopen the straits, owing, it is said, to very emphatic representations on the part of Russia. It was apparently a case where Turkey realized that although Italy might be held responsible by the nations for the closing of the Dardanelles, the ill-feeling on the part of neutrals caused by the loss to their trade would soon be turned against Turkey for keeping the Dardanelles closed. The following note was addressed by the Porte to the Ottoman representatives abroad and to the representatives of the Powers at Constantinople:

The Minister for Foreign Affairs has the honor to inform you that the Imperial Government has decided to reopen the Dardanelles to neutral vessels on the same conditions as those which obtained before their closure — that is, on condition that they should submit to being towed through the passage.

On the expiration of the period required for clearing the channel the straits will be opened under the above conditions.

It is unnecessary to add that the Imperial Government maintains the legitimate right completely to close the channel whenever the necessity arises.

The attitude of the Italian press upon the question is somewhat illogical: Turkey should not interfere with neutral commerce by closing the Dardanelles even at the cost of weakening her defenses, but Italy

cannot be expected to hinder her freedom of belligerent action by limiting her program of naval operations in the Ægean.

THE CANEVARO CASE AT THE HAGUE

On April 25, 1910, Italy and Peru negotiated a special agreement under the general treaty of arbitration of April 18, 1905, by virtue of which the claims of the Canevaro brothers were submitted to international arbitration at The Hague. The arbiters were Mr. Guido Fusinato for Italy, Mr. Manuel Alvarez Calderon for Peru, and the distinguished French jurist, M. Louis Renault, was chosen as umpire. The temporary tribunal thus composed held its first session on April 20, 1912, and, after hearing counsel, delivered its award on May 3, 1912. In his opening address, M. Renault, as president of the tribunal, stated:

It is not a matter of indifference to state that the practice of arbitration has become more and more a matter of international custom, and that general conventions concluded in this sense do not rest a dead letter but are regularly executed. Political opinion must become accustomed to see thus settled differences which arise between governments and which, without forming conflicts properly so called, are of a nature to embarrass the relations of the two countries and to render them less cordial. There are often cases in which, notwithstanding good will on both sides, it is impossible to arrive at an amicable settlement. An impartial tribunal can alone furnish the solution, which shall be thereupon accepted without difficulty by both of the litigants. You will excuse a juriconsult by profession, who for many years past has devoted himself to the theoretical and practical study of international arbitration, in emphasizing the interest of this new case to be tried at The Hague.

The question submitted to the tribunal is thus stated in the special agreement of April 25, 1910:

Ought the Peruvian Government to pay in coin, or in accordance with the provisions of the Peruvian law on the domestic debt of June 12, 1889, the drafts (*lettres à ordre, cambiali, libramientos*) now in the possession of the brothers Napoleon, Carlo, and Raphael Canevaro, and which were drawn by the Peruvian Government to the order of the firm of José Canevaro & Sons for the sum of 43,140 pounds sterling, plus the legal interest on the said amount?

The tribunal first considers the status of Raphael Canevaro, who was born in Peru of Italian parentage. It considers him as having a two-fold nationality: first, by birth in Peru, and second, as the child of an Italian father. It considers, however, that for the purposes of this case the claimant, Raphael Canevaro, had elected to consider himself a

Peruvian citizen and that, by virtue of such election, he acquired not merely Peruvian, but lost Italian citizenship. Not being an Italian citizen, his rights in the premises are such rights as a Peruvian would have against the Government of Peru, and his claim is therefore dismissed from further consideration.

The Italian nationality of the brothers Napoleon and Carlo Canevaro was admitted and therefore was not a subject of dispute. The tribunal then passed to the consideration of the claim upon its merits. Briefly stated, it appears that the dictator Pierola issued a decree on December 12, 1880, by virtue of which there were created, under date of December 23, 1880, pay checks (*bons de paiement, libramientos*) to the order of the firm of José Canevaro & Sons for the sum of 77,000 pounds sterling, payable at different periods, that the pay checks drawn to the order of Canevaro & Sons were not paid as they fell due, that in 1885 the Peruvian Government paid 35,000 pounds sterling on account, thus leaving due and outstanding to the firm, which had been reorganized in 1883 owing to the death of José Canevaro, the sum of 43,140 pounds sterling. By a law of 1886 the Peruvian Government confirmed the pay orders (*libramientos*), bonds, etc., issued before January, 1880, in order, it would seem, to invalidate the acts of the dictator Pierola subsequent to that date, which, if strictly interpreted, would exclude the Canevaro claims, which arose on December 23, 1880. As, however, the Peruvian Government subsequently recognized the validity of these claims, the tribunal felt justified in disregarding the act of 1886, in so far as it applied to the claims in question.

The tribunal found that the firm of Canevaro & Sons, reorganized in 1885 upon the death of the father, was composed of José Francisco, Cesar and Raphael Canevaro, Peruvian citizens, so that it was Peruvian by domicile as well as by the nationality of its members, and that the firm remained in existence until it was dissolved in 1900 by the death of José Francisco Canevaro. The tribunal, therefore, found that the debt was domestic in its origin and subject to the laws of Peru, just as any other portion of the domestic debt. The law of 1889 issued, it would appear, 1 per cent. bonds for the domestic debt, and it would seem that the provisions of the law applied to the claim of the firm of Canevaro & Sons, which was the claim of a Peruvian firm against the Peruvian Government. The firm had attempted unsuccessfully to avail itself of the provisions of the law regarding debts created for a military purpose, but in seeking the benefit of the law it naturally recognized the appli-

cability of the law to its claims. Hence the tribunal found that the firm had recognized the act of 1889.

At the trial, the claimants Napoleon and Carlo Canevaro urged their Italian nationality as a reason why the act of 1889 should not affect their claim, but the court held that their title was derivative and could be neither better nor worse than the right originally acquired by the firm through which they directly or indirectly claimed. As, therefore, the claim of the firm was subject to the law of 1889, the claim in the hands of the brothers Napoleon and Carlo was subject to the same law. Hence, instead of the sum of 43,143 pounds sterling, they were only entitled to the bonds issued in 1889 to meet this indebtedness.

The bonds or orders of payment (*libramientos*) of 1880 bore 4 per cent. until due, and after this period until payment the legal rate of 6 per cent. But, as the act of 1889 provided 1 per cent. interest, the tribunal allowed 4 per cent. upon the original outstanding indebtedness until the date of maturity, 6 per cent. after that date until the first of January, 1889, and 1 per cent. upon the bonds issued in 1889 until July 31, 1912, at which date the bonds were to be paid. The tribunal, however, provided further that payment might be delayed until the first of January, 1913, but that from the first of August, 1912, to the first of January, 1913, the debt should bear 6 per cent. interest.

It will be noted that the claims of Napoleon, Carlo and Raphael were submitted to the tribunal, but, as the tribunal found that Raphael Canevaro was a Peruvian citizen, his claim was disallowed, as the Italian Government had no right to present a claim of a Peruvian citizen. As the three brothers were equal claimants, the judgment of the tribunal only affected the interests of the Italian claimants, Napoleon and Carlo Canevaro.

It should be especially noted in conclusion that the tribunal would have considered the claim as purely domestic and would have refused jurisdiction, had it not been for the fact, pointed out in the judgment, that by the *compromis*, the material portion of which has been quoted, the Peruvian Government consented to submit the claim, although domestic, to international arbitration.

In opening the tribunal, its illustrious president, M. Louis Renault, stated that the Canevaro case did not have the importance of other cases submitted to and decided by a temporary tribunal of the Permanent Court of The Hague. This may be admitted, but every submission to international arbitration tends to create the habit of sub-

mission, and is therefore, irrespective of its importance, an international event of capital importance.

THE DEVELOPMENT OF THE MONROE DOCTRINE

The March number of the English *Review of Reviews* devotes seven of its valuable pages to a remarkable article by Senor A. de Manos-Albos entitled "The Next Great Word in the Evolution of Peace. A Plea for Development of the Monroe Doctrine," and "Wanted, a Revised and Extended Monroe Doctrine." It is prefaced by a brief note by Mr. Stead referring to its author as "one of the shrewdest and ablest public men to whom Latin America has given birth in our time." Mr. Stead further characterizes the article as "a masterly presentation of a plea for taking a forward step towards the world's peace by adding to the Monroe Doctrine, which forbids all conquest by European nations in the Western Hemisphere, the important corollary placing under the same interdict all conquest in the American Continent, without regard to the origin of the conquerors." He contends that the adoption of such a principle by the United States would remove the one great obstacle to the extension of her influence and interests in Latin America.

The article so introduced is written with great brilliancy, eloquence and power, dwelling with effect upon the horror of war, the admitted equality and independence of nations and the deep injustice of the stronger trespassing upon the weak. It also shows how "the predatory spirit" is ever on the increase and may be deemed immortal in Europe where it is "deeply rooted in the entrails of past centuries." It points out the immunity from this spirit which the new world has enjoyed, where the attempt of France upon Mexico and of Spain upon Peru "have left no lasting historical trace." It pictures the tide of blood and treasure constantly poured by the old into the new world, now largely into the southern continent, and shows the anxious contemplation of this by the European empires. It suggests that this movement is largely due to the effort to escape "the weary and life long price imposed upon the millions of the masses" as "the fee of empire and of greatness." The war in Tripoli is made a speaking lesson. It urges that the temptation to European Powers to acquire the territory of the seventeen republics, from Mexico to Cape Horn, with an area several times that of central Europe and a population at best of but seventy millions, is vastly beyond the temptations to acquire Egypt, Morocco, Tripoli or Mada-

gascar. That if an army of 100,000 men were landed without warning "in true Italian fashion" on one of the sparsely settled republics resistance would be unavailing and the young nation must succumb, like the ancient powers of the East.

Senor de Manos-Albos complains that the United States, while forbidding European conquest in America, have themselves "on occasions turned conquerors." That "the brooding storm of distrust" will disappear from the Latin American mind if the doctrine which he advocates is accepted and acted upon by the United States, and he thinks the present an opportunity for President Taft to establish it. He advocates a declaration "that conquest of territory shall hereafter neither be practiced nor tolerated on the American continent."

Every mind devoted to peace and justice, and we believe they are in the great majority in our own country and in the thinking world, will accede to this sentiment, but, it is submitted, with a broad exception. No nation can retain its sovereignty and independence if it so gravely abuses these high trusts as to prove a permanent and serious menace to the welfare of its neighbors and mankind. The law of necessity in matters of self-protection is fully recognized in municipal law and it cannot be ignored in international affairs. "No man liveth unto himself alone" nor does any nation. Conquest for greed of territory, or treasures, or men ought to be resisted and condemned and we cannot too strongly pledge ourselves against it.

The duty to intervene should not be lightly assumed, but no pledge never to intervene at the call of absolute necessity, no pledge not to appropriate under like necessity ought to be given or exacted. No such pledge, however solemnly uttered, will avail against the compulsion of such a situation if it arises and integrity and prudence alike forbid that it should be given.

The methods which apply to acquiring private property can not be applied between nations; but, exactly as an individual may sacrifice property, liberty and even life by misconduct, and exactly as the rules of law and morality fully recognize and enforce this forfeiture, so may the aggregation of individuals, which we call a state, sacrifice territory, independence and even existence, and that which it forfeits by its faults another sovereignty must assume and administer for the good of all.

With this vital exception *ex necessitate* we can as heartily commend the substance of Señor de Manos-Albos contention as we do its moving and impressive presentation.

DENMARK — THE DEATH OF KING FREDERICK VIII

On May 15 King Frederick VIII of Denmark died in Hamburg while returning to Copenhagen from a trip to the south, whither he had gone in search of health. The circumstances of his death were pathetic in the extreme. Wandering from his hotel in the evening, unattended and in citizen's garb, in accordance with a habit of years, he fell in the street, was hurried to a hospital by bystanders who did not recognize him, and died before the members of his family were aware of his absence. So that his death was like his life; for he was universally known as the most democratic monarch of modern times, simple in all his tastes, fond of mingling with the common people, and not at all disposed to impress his own personality upon the constitutional government of which he was the head. He was more widely related to European royalty than any of his contemporaries, and inherited from his father the pseudonym of "the father-in-law of Europe." He was a brother of the queen mother Alexandra of England, of King George of Greece, and of the widowed dowager Empress of Russia. His second son, Karl, was elected King of Norway in 1905, and now reigns as Haakon VII. He was also uncle of the Czar of Russia, and of King George of England. Thus his death plunged four courts into mourning.

On the day after the crown prince Christian was proclaimed King of Denmark as Christian X, and the orderly government of the little peninsular kingdom proceeded without agitation or excitement.

For another reason than this change in her ruler, Denmark has been much in the eyes of the world recently; the political prophets of Europe have had much to say about the schemes of Germany for the absorption of Holland, and about a secret understanding between Germany and Denmark by which the latter is to become a member of the federation, with a large measure of home rule, and Germany thus gain peaceful possession of Esbjerg, the best harbor on the Danish coast. Predictions and rumors of this character are a part of the daily provender of the European press, and are not as a rule taken very seriously in the chancelleries. But the story about Denmark has been so persistent that some of her own people became alarmed, and in March they led to an interpellation in the Danish parliament. It came from the Conservative party, and it promptly elicited from Count Aplefeld, the foreign secretary, a statement so definite and sweeping in its character,

that it at once put an end to all apprehensions, and rightly takes its place as an international event of no little importance. He said:

Denmark is unanimous in its opinion about its foreign policy. If we have a conflict with any other state which we cannot solve by diplomatic negotiations, we shall submit it to arbitration. Our position during any conflict between foreign countries is absolute neutrality. The Danish Parliament and the Danish Government have declared this policy on every necessary occasion. Denmark is not either directly or indirectly bound by any agreement, either tacit or written. We have no treaties and no alliance. The Danish Government enjoys the very best understanding with all other Governments, and no foreign Power can draw us away from our absolutely non-party attitude to other states. The government, with extreme regret, has learnt that its entirely neutral policy has incurred suspicion and hostility amongst a certain party in the country. An attempt has been made to describe the government's policy as the fruit of direct or indirect pressure from Germany, which was supposed to weaken our national independence and lower our prestige among the nations.

I want on this occasion to announce as strongly as I can that all these insinuations are, without exception, entirely devoid of foundation, and I hope sincerely that all these rumors will henceforth disappear.

The foreign secretary proceeded to deny categorically and emphatically, that any pressure of any sort had been brought to bear by Germany upon the Danish Government in military questions of any character. He admitted that there had been lengthy discussions between the two governments, but insisted that they related to the conditions under which Danish-speaking subjects were living in Schleswig, and were based upon two principles, one, that the *status quo* which arose out of the treaty with Germany must be maintained, and the other, that the preservation of the Danish language and culture profoundly touches the sentiment of the whole Danish nation.

At the conclusion of his address, the foreign secretary was given a vote of confidence in which the members of all four of the political parties represented in the Folkething unanimously joined.

The sentiment of the Danish people appears to be united that the continued and absolute neutrality of the kingdom is the only safeguard of its independence. The subsequent death of King Frederick and the accession of Christian have been accompanied by many evidences of this national feeling. The Danish people are much stirred in these days by the growth of socialism in their midst; but upon the question of the preservation of their hard earned independence by the maintenance of the strictest neutrality in European politics, they appear to be singularly united.

APPLICABILITY OF THE CASE OF *ALTMAN V. THE UNITED STATES* TO SPECIAL
AGREEMENTS CONCLUDED UNDER A GENERAL TREATY OF ARBITRA-
TION

In a case decided on May 13, 1912, entitled *B. Altman & Co. v. The United States*, there is an interesting passage in the opinion of the Supreme Court of the United States, as delivered by Mr. Justice Day, which throws light upon the nature of an agreement concluded by the executive in pursuance of authority conferred by Act of Congress. It appears from the decision of the Supreme Court that a certain bronze bust was imported by the appellants from France and was assessed "a duty of 45 per cent ad valorem under paragraph 193 of the Tariff Act of 1897 (30 Stat. 151), which covers articles or wares not specially provided for in the act, composed wholly or in part of metal, and whether partly or wholly manufactured. A protest was filed by the importers, in which they contended that the bust should be classed as statuary under the commercial reciprocal agreement with France (30 Stat. 1774), which was negotiated under the authority contained in section 3 of the Tariff Act of 1897 to make reciprocal agreements with reference, among other articles, to paintings in oil or water colors, pastels, pen and ink drawings, and statuary."

Section 3 of the Tariff Act of June 24, 1897, authorized the President to negotiate "commercial agreements in which reciprocal and equivalent concessions may be secured in favor of the products and manufactures of the United States; whenever the government of any country, or colony, producing and exporting to the United States the above mentioned articles, or any of them, shall enter into a commercial agreement with the United States, or make concessions in favor of the products, or manufactures thereof, which, in the judgment of the President, shall be reciprocal and equivalent, he shall be, and he is hereby, authorized and empowered to suspend, during the time of such agreement or concession, by proclamation to that effect, the imposition and collection of the duties mentioned in this act, on such article or articles so exported to the United States from such country or colony, and thereupon and thereafter the duties levied, collected and paid upon such article or articles, shall be as follows, namely," and so forth.

Pursuant to such authorization, the President concluded a commercial agreement with France on May 30, 1898, which, among other things, admitted paintings in oil or water colors, pastels, pen and ink drawings,

and *statuary*, at 15 per cent *ad valorem*. The question in the particular case was whether the bust imported by the appellant should pay 45 per cent under the Tariff Act or 15 per cent under the special agreement of May 30, 1898. The court found that the object did not properly fall within the terms of the special agreement, with which holding the present comment has nothing to do. In passing, however, upon the special agreement concluded by the President under section 3 of the Tariff Act, Mr. Justice Day, speaking for the court, held that the reciprocal agreement was such a treaty within the meaning of section 5 of the Circuit Court of Appeals Act as to create the right of direct appeal to the Supreme Court. Thus,

Generally, a treaty is defined as "a compact between two or more independent nations with a view to the public welfare." 2 Bouvier's Dictionary, 1136. True, that under the Constitution of the United States the treaty making power is vested in the President, by and with the advice and consent of the Senate, and a treaty must be ratified by a two-thirds vote of that body (Art. II, sec. 2), and treaties are declared to be the supreme law of the land (Art. VI); but we are to ascertain, if possible, the intention of Congress in giving direct appeal to this court in cases involving the construction of treaties. As is well known, that act was intended to cut down and limit the jurisdiction of this court, and many cases were made final in the Circuit Court of Appeals which theretofore came to this court, but it was thought best to preserve the right to a review by direct appeal or writ of error from a Circuit Court in certain matters of importance, and, among others, those involving the construction of treaties. We think that the purpose of Congress was manifestly to permit rights and obligations of that character to be passed upon in the Federal court of final resort, and that matters of such vital importance arising out of opposing constructions of international compacts, sometimes involving the peace of nations, should be subject to direct and prompt review by the highest court of the nation. While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, section 3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act, and, where its construction is directly involved, as it is here, there is a right of review by direct appeal to this court.

It thus appears that the Supreme Court is of the opinion that a special agreement with a foreign nation concluded by the President, in virtue of a general authorization by Act of Congress, was, for purposes of

judicial decision, to be considered a treaty, even although it was "not a treaty possessing the dignity of one requiring ratification by the Senate of the United States." That is to say, the President may, by general act, be authorized to conclude a special agreement with a foreign power, and this special agreement, although not a treaty in the strict and technical sense of the word, for it does not require the advice and consent of the Senate, is nevertheless "an international compact" binding the respective parties to it. The question of delegation of power was not raised, nor was it passed upon by the court; the validity of the delegation would seem to be settled in favor of such commercial agreements by the case of *Field v. Clark*, 143 U. S. 649 (1891).

The case, therefore, would seem to recognize a twofold division of international agreements, namely, "international compacts" of such dignity as to require the advice and consent of the Senate, and "international compacts" which do not possess such dignity and do not therefore require the advice and consent of the Senate. In other words, the legislative branch of the government may pass a general act laying down definite lines and may authorize the President to enter into "international compacts," either to carry out its express provisions, or to modify them in accordance with an express authorization, whenever in his judgment facts or conditions exist, upon which the authorization is predicated.

The importance of this decision of the Supreme Court and its applicability to treaties of arbitration were called to the attention of the recent Mohonk Conference on May 18, 1912, by Charles Henry Butler, Esquire, Reporter of the Supreme Court. This contention would appear to be correct; for, if the President can be authorized by a general Act to enter into an "international compact" with nations to effect the purposes of the Act, it would seem to be clear that a general treaty of arbitration — for a treaty is, by the express words of the Constitution, a general law of the United States, differing in origin though not in effect from a statute — might be negotiated by the President, advised and consented to by the Senate, and that the special agreement, the "international compact" required to carry it into effect in a given case, might properly be concluded by the President in accordance with a general authorization. Such an agreement would not possess the dignity of the original general treaty of arbitration; it would, however, be an "international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting

countries, and dealing with important relations between the two countries." The Supreme Court has held that an "international compact" does not in all cases require the advice and consent of the Senate; now a special agreement, entered into with a foreign state in order to give effect to a general treaty of arbitration, provided the general treaty defines clearly the character of cases to which its provisions are applicable, would seem to differ in its accidental but not in its essential character from a special agreement negotiated under a general Act of Congress.

Under the general treaty of arbitration a special agreement might thus be negotiated by the President without submitting it to the Senate and delay thus avoided, and the query arises, could not the question as to whether the case to be submitted falls within the lines laid down in the general treaty, under appropriate circumstances, as in the case of *Altman v. United States*, be tested in the courts? If this should prove to be the case, would not the objection of the Senate to a special agreement drafted by the President without submission to the Senate be largely overcome?

THE BASIS OF MEDIATION IN THE WAR BETWEEN ITALY AND TURKEY

Since the last issue of the JOURNAL the indirect attempts at mediation by the Powers in the war between Italy and Turkey have resulted in the issuance of a definite statement by each of the belligerent parties as to the basis on which they would be willing to consider terms of peace. The official statements of the two governments bring us, however, no nearer a solution of the controversy. The deadlock is only more complete in that the belligerents publicly declare that they mean to continue to stand where they have hitherto shown every intention of standing.

It will be remembered that on February first a circular note was drawn up by the Russian Government and communicated to the Powers, exhorting them to consider seriously the situation, and to make ready to seize a favorable opportunity for mediation in the war between Italy and Turkey. The note was, of course, fully justified with respect to the Powers at war by Article 3 of the Convention for the Pacific Settlement of International Disputes, by which the contracting Powers agree that it is "expedient and desirable that one or more Powers, strangers to the dispute, should, on their own initiative, and so far as circumstances may allow, offer their good offices or mediation to the States at variance."

The representatives of the five Powers, Austria-Hungary, France,

Germany, Great Britain and Russia, first took steps to obtain from the Italian Government a statement as to the terms upon which it would be willing to conclude peace. On March 16, the *Corriere della Sera*, a Roman newspaper, published unofficially the text of a note delivered by the Marquis de San Giuliano to the ambassadors of the Powers the afternoon before. A summary of the note was given in the *London Times* of March 20. The note begins with an expression at once of thanks from the Italian Government for the suggestion of mediation by the Powers, and of full agreement with the reasons which led them to that act. After briefly stating the causes which led Italy to declare war upon Turkey, and reiterating the determination of Italy not to disturb the *status quo* in the Balkans, it insists that the recognition by Turkey of the full and complete sovereignty of Italy over Tripoli and Cyrenaica must precede any discussion of the conditions upon which peace may be concluded. The note then sets forth certain points of reciprocal concession on the part of both Italy and Turkey with respect to the administration of Tripoli under Italian sovereignty, in order to save the *amour propre* of Turkey, which is thus called upon to renounce her former province. Italy proposes that in the treaty of peace Turkey should merely recognize the "new state of things," (*i. e.*, Italian occupation), while the Powers would be called upon to recognize as a "juridical situation" the Italian proclamation of sovereignty over Tripoli.

Just one month later the ambassadors of the same Powers paid separate visits to the Foreign Minister at Constantinople, pointing out to him in friendly terms the danger to European peace which was involved in the continuation of hostilities between Turkey and Italy, and requesting to be informed of the conditions upon which the Porte would be ready to conclude peace. On April 23, the Turkish Government sent to the ambassadors an official statement of its position with respect to the offer of mediation. The French text of the reply is to be found in full in the *London Times* of May 1st.

The Turkish Government first acknowledges its appreciation of the motives which led the great Powers to inquire of the belligerents the conditions upon which mediation would be acceptable, and thanks them for their friendly communication to that effect. The government then recalls the efforts which it made before the war and during the first days of hostilities to satisfy the Italian demand for concessions in Tripoli, so far as this could be done without compromising its sovereignty. It likewise recalls, doubtless with a suggestion of irony, that at

the beginning of the war it had sought the good offices of the Powers with a view to inducing Italy, in the name of the general peace and out of respect for the treaties guaranteeing the integrity of the Ottoman Empire, to desist from the conflict. The reply next calls attention to the fact that the bond between Tripoli and the Empire, as manifested by the tenacity with which that province had resisted the Italian invasion, was so close that the demand upon the Turkish Government to amputate Tripoli was equivalent to a proposition of suicide. This bond between the province and the Empire was one not dependent upon the predominance of any one party in Turkey. If Turkey were to abandon a province so strongly attached to the mother country, the act would cause an upheaval throughout the whole Ottoman Empire, which would endanger not only the domestic peace of the Empire, but would complicate the international situation to an even greater degree. "The result of such an act would thus be diametrically opposed to the object sought by the friendly Powers, that is to say, the maintenance of the general peace." In this state of affairs the Turkish Government is forced to declare that it could not enter into negotiations unless they were to have "as a basis and point of departure, the effective and integral maintenance of the sovereign rights of His Imperial Majesty the Sultan, the formal renunciation by Italy of the annexation of the Ottoman Provinces of Tripoli and Benghazi, and the prior agreement on the part of Italy to withdraw her troops."

Inasmuch as there is a clear and definite issue between the belligerents and neither of them is prepared to consider any compromise on the vital point at stake, it is difficult to see what could be accomplished at present by an international conference, if it were to be called. In fact it appears from semi-official sources that the idea of an international conference is acceptable to neither Italy nor Turkey. There seems to be a general agreement among European diplomats that the program of such a conference would have to be strictly limited to the issue concerning Tripoli; but so long as neither party is willing to yield on the fundamental proposition of sovereignty over Tripoli, the labors of the conference would be doomed to failure in advance. With the decisions of the Congress of Berlin before her as a precedent, Turkey could not hope to gain by an international conference unless she were at her last gasp, which is clearly not the case so long as Turkey can control domestic revolt within the Empire. If the great Powers of Europe have hitherto refrained from dividing among themselves the Turkish possessions in Europe, their

unselfishness has been due, the Porte may be inclined to think, not to consideration for Turkey, but to the difficulty of deciding upon a partition satisfactory to all the claimants. On the other hand, the Porte has only European dissension to thank if the traditional Turkish misrule in her European provinces and the persecutions to which the Christian population of the vilayets has been from time to time subjected, have not long since cost her the loss of those territories. International law, it is true, does not recognize the rights of an individual apart from his citizenship in a given state, hence under strict law a state may subject a certain portion of its own subjects to greater burdens than it puts upon others, without being accountable before the nations; but if these burdens reach the point of persecution, and especially if they are attended by physical violence, so as to outrage the feelings of the citizens of other states, who are bound to the sufferers by ties of race or religion, it may well be a question whether foreign nations may not intervene in the interest of their own domestic peace.

WILLIAM T. STEAD, 1849-1912

Among the victims of the *Titanic* disaster of April 14, 1912, was William T. Stead, and the JOURNAL cannot allow this issue to go to press without a brief statement of his services to the cause of international peace. Mr. Stead's activities as a journalist and as a man interested in all good causes are too well known to require comment, but his services in connection with the First and Second Hague Conferences, unofficial though they were, are not his least title to remembrance. He attended the First Conference in 1899, secured adequate notices of its work in the journals and published in French a well-known account entitled *The Conference at the Hague*. In 1907 he attended unofficially the Second Hague Conference and, as in 1899, secured notices in the press, which went far to counteract the imperfect and often hostile accounts which appeared in the newspapers generally. He prepared and published in French, at his own expense, a volume entitled *Le Parlement de l'Humanité*, a sort of "Who's Who" of the Conference, with portraits of the delegates, and during the entire course of the Conference he issued in French, at his own expense, a daily journal entitled the *Courier de la Conférence*, which was, and still remains, the best daily account of the proceedings of the Conference, as well as of the hopes and aspirations of

its members. These various works were but a fraction of his literary activity. They are, however, sufficient in themselves to give him an honored place in the hearts of all who believe in the Hague Conferences and see in them the instrumentality of creating an international law, which will regulate, according to the principles of justice, the foreign relations of nations.

APPROVAL OF THE DECLARATION OF LONDON BY THE UNITED STATES
SENATE ON APRIL 24, 1912

It will be recalled that the Second Hague Peace Conference adopted a convention for the establishment of an International Prize Court, but that certain of its provisions were objected to by certain of the signatory countries, which nevertheless approved the idea and the convention as a whole. The United States considered unacceptable those provisions which authorized and required an appeal in prize cases from the decision of the Supreme Court of the United States to the International Court of Prize to be established at the Hague.³ For this reason an alternative procedure was proposed by this government, which, while allowing a direct appeal from courts of last resort, would nevertheless permit certain countries to submit to the Hague court the questions involved rather than the judgment itself of the national court of last resort. An additional protocol to this effect was drawn up and signed by representatives of the various governments at The Hague on September 19, 1910, and the additional protocol has since been approved by all the signatories to the convention. On February 15, 1911, the Senate of the United States advised and consented to the ratification of the original convention as modified by the additional protocol, so that, as far as the United States is concerned, the objection to the establishment of the International Prize Court has been removed.

In the next place, a difficulty arose as to the law to be applied by the International Prize Court. Article VII provides that, if the question in issue has been regulated by a treaty between the countries in litigation, the provisions of this treaty should be binding upon the court. The meaning of the treaty would undoubtedly be subject to interpretation, but the law would exist in a tangible shape which the court was to interpret and apply. This provision is clear and has given rise to no controversy.

³ Articles III and VI of the original Prize Court Convention.

The second paragraph of Article VII, however, has been the subject of heated discussion, for it provides that "in the absence of such (treaty) provisions, the court shall apply the rules of international law. If no generally recognized rule exists, the court shall give judgment in accordance with the general principles of justice and equity." In the discussion of the convention, Russia and Japan objected that the law in such matters was not settled and that an agreement upon the law to be applied should precede the establishment and operation of the court. The British delegation proposed the provisions, but the Government of Great Britain objected to them and declared that, unless an agreement should be reached upon the law to be applied by the court in certain branches of prize law, Great Britain would be unable to ratify the convention. It, therefore, suggested an international conference of naval Powers to meet at London. The Powers consulted accepted the proposal and a naval conference, composed of representatives from Germany, Austria-Hungary, Spain, France, Great Britain, Italy, Japan, The Netherlands, and Russia, met at London on December 2, 1908, adopted the so-called Declaration of London, and adjourned on February 26, 1909.⁴

It is not the purpose of the present comment to examine the provisions of the Declaration of London or to determine in how far they met the objections, which had been raised to Article VII of the Prize Court Convention. Opinion is divided on this question, but it is generally agreed that the declaration marks a decided advance and that, even although some of its provisions are properly open to criticism, the declaration is an acceptable compromise and a clear statement of hitherto conflicting views. The British Government accepted the declaration and signed the Prize Court Convention, but, as it had made the acceptance of the declaration a prerequisite to the ratification of the Prize Court Convention, it is evident that, so far as Great Britain is concerned, the fate of the Prize Court hangs upon the declaration. The Prize Court Convention and the declaration necessitated changes in its municipal law, and a prize bill was introduced and passed in the House of Commons to bring municipal law into accord with the international agreements. The House of Lords rejected on December 15, 1911, the prize bill. Hence, so far as Great Britain is concerned, it can not at present co-operate in the establishment of the Prize Court. The British Government, however, has stated its intention to reintroduce the bill, and, if the opposition of the House of Lords can not be overcome, to take

⁴ For the text of the Declaration, see Supplement, Vol. 3, p. 179.

advantage of the revised procedure, which enables a bill which has three times passed the House of Commons, to become a law without the assent of the upper chamber. It is to be hoped that the bill will eventually be passed and that Great Britain will be enabled to co-operate in the establishment of the great and beneficent International Court of Prize.

As previously stated, the acceptance of the additional protocol removed the one serious objection which the United States had made to the Prize Court Convention. The Declaration of London, which refers to the convention and supplies the law to be administered in certain cases by the court under Article III of the convention, was submitted to the Senate in April, 1909. No action was taken at this time, because it was deemed inexpedient to approve it before the Prize Court Convention was modified so as to remove objections. It was also deemed advisable to await the action of Great Britain. It would have been proper to consider at one and the same time the Prize Court Convention, the additional protocol and the declaration, because they related to one and the same subject. The Senate, however, acted favorably upon the convention and the additional protocol without considering the declaration. However, on April 24, 1912, the declaration was taken up by the Senate, and advised and consented to. Therefore, as far as the United States is concerned, the President is in the fortunate position to deposit ratifications of the convention and the additional protocol, whenever a date is fixed by The Netherlands Government, and the President is also enabled to deposit ratifications of the Declaration of London in accordance with its provisions, whenever he may care to take such action.

It is a source of congratulation to those who believe that conflicts of a judicial nature may be settled peaceably and satisfactorily by international courts of justice, to learn that the United States has, by the approval of these various instruments, given concrete expression to its belief in the peaceful settlement of international disputes, which has been a cardinal principle of the United States since its independent existence as a member of the society of nations.

THE EIGHTEENTH LAKE MOHONK CONFERENCE ON INTERNATIONAL ARBITRATION

The Eighteenth Lake Mohonk Conference on International Arbitration, held at Mohonk Lake, N. Y., May 15th-17th, was, like its predecessors, representative of many callings and nationalities, there being

present natives of not less than ten countries. While the spirit of gratification so conspicuous at the meeting of 1911 was absent, it cannot be said that the conference reflected in marked degree the recent reverses which the international peace movement has apparently suffered. Its tone was rather one of earnest purpose and practical recognition of difficulties to be overcome.

The absence of attempts to urge the subject of disarmament and the statement in the platform that the decrease of armament "should correspond to the steady increase of the instrumentalities for the legal and peaceful settlement of disputes," signified the continued belief of the conference that through development of arbitration into a system of international justice with an international law interpreted by a true court of nations must come permanent relief from the burdens of armaments. The importance of thus building up effective substitutes for the war system, was emphasized in many addresses, including those of George Grafton Wilson, of Harvard University, defining the bases of international legislation; of Everett P. Wheeler, of New York, who advocated a plan for expediting reference of claims to the Hague Tribunal; and of James Brown Scott, Secretary of the Carnegie Endowment for International Peace, who discussed subjects for possible consideration at the Third Hague Conference. Much interest also attached to the prediction by Charles Henry Butler, Reporter of the United States Supreme Court, that the decision rendered by that Court on May 13, 1912, in the case of *Altman & Co. v. The United States*, might open the way to Congressional assent to arbitration of many questions without a special treaty in each case.

Albert Gobat, Director of the International Peace Bureau, Christian L. Lange, General Secretary of the Interparliamentary Union, Otfried Nippold, of Oberursel, Germany, and Eduard de Neufville, of Frankfurt, Germany, entertainingly described the enlisting in the peace movement of social forces in Europe. Of particular interest was the clear-cut address of Charles P. Neill, United States Commissioner of Labor, who showed the advantage and necessity of co-operation with organized labor in its natural desire to avoid the results of war.

The co-operation of business men, for many years a distinctive feature of the conferences, was especially evident. The forty-six delegates from as many leading chambers of commerce and boards of trade, including fifteen presidents or former presidents of their organizations, considered in special session plans by which commercial interests can promote

peace, and reported a resolution, which was unanimously adopted, urging the representatives of commercial interests "throughout all countries to be continuously active in shaping public opinion so as to make it more difficult to attempt to settle international disputes by war; and also, when disputes may approach an acute stage, to bring every possible influence to bear upon governments to induce them to submit such differences to arbitration." The address of John Ball Osborne, Chief of the Bureau of Trade Relations of the Department of State, advocating reference to arbitration of international commercial differences, led to a resolution commending the subject to the attention of business men everywhere, while a striking paper by Rear Admiral Chadwick contrasted the peaceful effect of orderly commerce with the incentive to armament resulting from unnatural trade jealousy.

The disappointment which many expected would follow the amendment by the Senate of the treaties of arbitration with Great Britain and France was not conspicuous. Some criticisms of the Senate's action brought out defenses of that body by H. A. Powell, of Canada, Member of the International Joint Commission, and Charles Henry Butler, and a defense of the treaties, as ratified, by Theodore Marburg, while General Stewart L. Woodford declared the event no occasion for permanent disappointment. William C. Dennis, of Washington, described the effect of the Senate's amendments, in view of which he believed the treaties should not be consummated. Albert K. Smiley, the host of the conference, seemed to voice a popular feeling when he said the Senate's action, presumably indicating that about half the people of this country are not ready for treaties of so wide a scope, called for a renewed and organized campaign of education. Significant of the extent of his belief was the earnest if not altogether harmonious discussion of proposed plans for providing for the United States a national council for arbitration and peace.

The dignified address by Salvador Castrillo, Minister of Nicaragua, in advocacy of the pending commercial treaty between his country and the United States, and the eloquent appeal of J. P. Santamarina, of Buenos Aires, for the United States to evidence her good faith by submitting to arbitration with Colombia the question of Panama, were sympathetically received.

The opening address of Nicholas Murray Butler, chairman of the conference, was a masterly plea for the acquisition by all countries and especially by the United States of the "international mind" which he

defined as "that habit of thinking of foreign relations and business, and that habit of dealing with them, which regard the several nations of the civilized world as friendly and co-operating equals in aiding the progress of civilization, in developing commerce and industry, and in spreading enlightenment and culture throughout the world." He paid a high tribute to the European statesmen who solved without bloodshed the Moroccan difficulty of 1911. To some one of these men, he declared, a Nobel prize might well be awarded.

The platform, unanimously adopted, expressed the consensus of opinion as follows:

The Eighteenth Lake Mohonk Conference on International Arbitration expresses its profound gratitude to the President of the United States for his illustrious service for the cause of international peace in the effort for the arbitration treaties with Great Britain and France. We believe that the President, in this memorable effort, represented the great popular sentiment of the American people; and, deploring the defeat for the moment of his high purpose, we call upon the people for unremitting endeavor to secure the early conclusion of treaties of equal or broader scope with the great nations of the world.

It is pre-eminently the duty of the United States to maintain strong leadership in this commanding cause. We gratefully remember the initiative of its government for the second Hague Conference and for the establishment of the Court of Arbitral Justice; we record with satisfaction the recent ratification by the Senate of the United States of the Declaration of London which makes it possible to establish the International Prize Court, the Convention for which was previously ratified by the United States Senate; and on the eve of the creation of the committee to prepare the program for the third Conference, we urge such broad and advanced American action as shall contribute to secure the most efficient basis of organization and procedure for this and future conferences, the adoption of a general arbitration treaty, the marked development of the international court, and united action for the limitation of armaments, the decrease of which should correspond to the steady increase of the instrumentalities for the legal and peaceful settlement of disputes.

We emphasize anew the need of earnest efforts everywhere for such a public opinion as shall compel the powers party to the Hague Conventions to respect the same in in letter and spirit and to resort to no hostilities until all possible means of peaceful settlement are exhausted.

The Lake Mohonk Conference which has given to business men so prominent a place in its activities, views with peculiar satisfaction the fact that the International Congress of Chambers of Commerce which has always conspicuously recognized the cause of arbitration, has given it the first place on the program of its coming session in this country. At a time when commercial interests are recognizing as never before that the system of war and growing armaments violates the first principles of economy and good business, we welcome this great Congress as an occasion of the largest promise for international advance.

The presence at this conference of representatives of so many countries, and es-

pecially of the general secretaries of the two chief international agencies of the peace movement, the Interparliamentary Union and the International Peace Bureau, are inspiring evidences of the broadening co-operation of the world's peace workers. We greet with satisfaction the multiplying interchanges of teachers and students and every movement that brings the peoples closer together. International work must be internationally done; and only pervasive and persistent education can create the international mind which is the only sure defense from the dangers always liable to arise from false patriotism and selfish political ambitions. To this high work of education, we urge increased devotion from every agency which shapes public opinion.

THE SIXTH ANNUAL MEETING OF THE SOCIETY

The Sixth Annual Meeting of the American Society of International Law was held in Washington in the Hall of the Americas in the building of the Pan American Union, April 25-27, and ended with the annual banquet at the New Willard Hotel on the evening of Saturday, April 27, 1912.

As stated in the editorial comment for January, a single topic was chosen and discussed, namely, the program, organization and procedure for the Third Hague Conference, and the subjects, with the exception of the opening session, dealt exclusively with various phases of these questions. The fact that a third Hague Conference is to meet in or about 1915, and that two years before this a preparatory committee of the Powers should be appointed by common accord, in order to consider the program, organization and procedure for the conference, make it peculiarly appropriate for scientific societies interested in the success of the conference to discuss in advance questions of importance, which are likely to figure in the official program. The Institute of International Law, at its meeting in Christiania in the last week of August, 1912, will consider these questions in detail and no doubt other scientific societies will consider these matters more or less in detail, and publicists will contribute their views both to journals of international law and periodicals that take an interest in public and international questions.

As the various papers read at the meeting of the American Society of International Law and the discussions to which they gave rise will appear in the volume of the proceedings, now in press, it does not seem necessary or advisable to enter into details. The Friday morning session was devoted to a general discussion of the program of the Third Hague Conference. The paper of Mr. Joaquin de Casasus, formerly Mexican Ambassador to the United States, urged the reconsideration

by the Third Conference of the limited right to a revision of an arbitral award, provided by Article 55 and retained as Article 83 of the Hague convention for the pacific settlement of international disputes. The paper of Mr. Luis Anderson advocated the acceptance by international agreement of the Monroe Doctrine. Mr. Scott's paper dealt with the general subject and enumerated some of the subjects which, in his opinion, should properly be included in the definitive program of the Third Conference.

The sessions of Friday evening and Saturday morning were devoted to a detailed consideration of the more important subjects which should be, in the opinion of the Society, the subject of discussion and agreement at the forthcoming Conference: General Arbitration Treaties, the leading paper on which was read by ex-Senator Turner; the Codification of the Laws of Naval Warfare, the leading paper on which was delivered by Rear Admiral Charles H. Stockton; the Effects of War upon International Conventions and upon Private Contracts, a subject treated by General George B. Davis, delegate of the United States to the Second Hague Conference; the Marine Belt and the Question of Territorial Waters, upon which topic Mr. Thomas Willing Balch read a paper; a Permanent Court of International Justice, which was treated by Dr. James L. Tryon; and the Organization and Procedure of the Third Hague Conference, which subject was discussed at length, both in its theoretical and practical aspects, by Mr. Henry White, formerly American Ambassador to France and representative of the United States at various international conferences, notably the Algeciras Conference, and the Fourth Pan American Conference at Buenos Aires in 1910.

The opening session of Thursday evening was of a more general nature. Mr. Root, President of the Society, delivered his annual address upon The Real Significance of the Declaration of London, which appears on page 583 of this JOURNAL, as well as in the Proceedings. Mr. Pasquale Fiore, Senator of Italy and Professor of International Law in the University of Naples, read in French an elaborate paper on Some Considerations on the Past, Present and Future of International Law. Mr. Oscar S. Straus' address on the American Diplomacy of Humanity was read in his absence by the Secretary of the Society, and Mr. Everett P. Wheeler of New York read a paper entitled The International Regulation of Ocean Travel, suggested by the loss of the *Titanic*. A very valuable paper by Mr. Richard Olney, formerly Secretary of State, dealing with the subject of arbitration treaties was, owing to his absence, read

by the Secretary at the Friday morning session, and appears in this issue of the JOURNAL at page 595 as well as in the Proceedings.

The annual dinner has come to be regarded as the most enjoyable feature of the annual meeting and, following the precedent of 1911, it is destined to be as valuable as it is enjoyable, because the addresses delivered on this occasion are printed in the Proceedings. Mr. Root, who has hitherto acted as toastmaster, was unable to be present. His place was admirably filled by a younger member of the Society, Mr. Frederic R. Coudert of New York. Senator Henry Cabot Lodge, member of the Foreign Relations Committee of the Senate, spoke on the recent arbitration treaties; the Hon. George Gray, Circuit Judge of the United States Court of Appeals, spoke on the arbitration treaties, as well as of the importance of the judiciary in our system of government; the Hon. William Sulzer, Chairman of the Committee on Foreign Affairs of the House of Representatives, spoke on the foreign relations of the United States, especially with Canada and the Latin-American republics. The Right Honorable Robert L. Borden, Prime Minister of Canada, discussed the recent reciprocity agreement between Canada and the United States, and Mr. Christian L. Lange, Norwegian delegate to the Second Hague Conference and Secretary General of the Interparliamentary Union, delivered an address upon the nature and importance of the Interparliamentary Union in international affairs.

The following officers and committees were elected for the year 1912-13:

HONORARY PRESIDENT

HON. WILLIAM H. TAFT

PRESIDENT

HON. ELIHU ROOT

VICE-PRESIDENTS

CHIEF JUSTICE WHITE
JUSTICE WILLIAM R. DAY
HON. P. C. KNOX
MR. ANDREW CARNEGIE
HON. JOSEPH H. CHOATE
HON. JOHN W. FOSTER
HON. GEORGE GRAY

HON. JOHN W. GRIGGS
HON. WILLIAM W. MORROW
HON. RICHARD OLNEY
HON. HORACE PORTER
HON. OSCAR S. STRAUS
HON. SHELBY M. CULLOM
HON. JACOB M. DICKINSON

HON. JAMES B. ANGELL

EXECUTIVE COUNCIL

TO SERVE UNTIL 1913

HON. AUGUSTUS O. BACON, Georgia	EVERETT P. WHEELER, Esq., New York
HON. FRANK C. PARTRIDGE, Vermont	HON. EDWIN DENBY, Michigan
PROF. LEO S. ROWE, Pennsylvania	ALPHEUS H. SNOW, Esq., District of Columbia
F. R. COUDERT, Esq., New York	
PROF. WILLIAM R. MANNING, TEXAS	

TO SERVE UNTIL 1914

HON. RICHARD BARTHOLDT, Missouri	HON. A. J. MONTAGUE, Virginia
GEN. GEORGE B. DAVIS, District of Columbia	REAR ADMIRAL CHARLES H. STOCKTON, District of Columbia
PROF. CHARLES NOBLE GREGORY, District of Columbia	CHARLES B. WARREN, Esq., Michigan
	HON. JOHN SHARP WILLIAMS, Mississippi
PROF. THEODORE S. WOOLSEY, Connecticut	

TO SERVE UNTIL 1915

CHANDLER P. ANDERSON, Esq., New York	PROF. JOHN BASSETT MOORE, New York
CHARLES HENRY BUTLER, Esq., District of Columbia	JACKSON H. RALSTON, Esq., District of Columbia
PROF. GEORGE W. KIRCHWEY, New York	JAMES BROWN SCOTT, Esq., District of Columbia
ROBERT LANSING, Esq., New York	
PROF. GEORGE G. WILSON, Massachusetts	

EXECUTIVE COMMITTEE

HON. ELIHU ROOT	ROBERT LANSING, Esq.
HON. GEORGE GRAY	PROF. JOHN BASSETT MOORE
PROF. GEORGE W. KIRCHWEY	PROF. GEORGE G. WILSON
HON. OSCAR S. STRAUS	

EX OFFICIO

HON. JOHN W. FOSTER, *Chairman*
 JAMES BROWN SCOTT, *Recording Secretary*
 CHARLES HENRY BUTLER, *Corresponding Secretary*
 CHANDLER P. ANDERSON, *Treasurer*

EDITORIAL BOARD OF THE AMERICAN JOURNAL OF INTERNATIONAL LAW

JAMES BROWN SCOTT, *Editor-in-Chief*

CHANDLER P. ANDERSON	ROBERT LANSING
CHARLES NOBLE GREGORY	JOHN BASSETT MOORE
AMOS S. HERSHEY	GEORGE G. WILSON
CHARLES CHENEY HYDE	THEODORE S. WOOLSEY
GEORGE W. KIRCHWEY	

GEORGE A. FINCH, *Business Manager*

COMMITTEES

Standing Committee for Selection of Honorary Members: George G. Wilson, Chairman; Jackson H. Ralston, Theodore S. Woolsey.

Standing Committee on Increase of Membership: James Brown Scott, Chairman; Charles Cheney Hyde, John H. Latané, Jesse S. Reeves, Theodore S. Woolsey.

Auditing Committee: William C. Dennis, Alpheus H. Snow.

Committee on Codification: Elihu Root, Chairman *ex officio*; Chandler P. Anderson, Charles Henry Butler, Charles Noble Gregory, Robert Lansing, Paul S. Reinsch, Leo S. Rowe, James Brown Scott, George G. Wilson, Lawrence B. Evans.

Committee on Publication of the Proceedings of the Sixth Annual Meeting: George A. Finch, Otis T. Cartwright.

Committee on Seventh Annual Meeting: James Brown Scott, Chairman; Clement L. Bouvé, Charles Noble Gregory, Charles Cheney Hyde, Robert Lansing, Alpheus H. Snow, George G. Wilson.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Ann. Vie Int.*, Annuaire de la Vie Internationale, Brussels; *Arch. dipl.*, Archives Diplomatiques, Paris; *B.*, boletín, bulletin, bolletino; *B. P. U.*, bulletin of the Pan-American Union, Washington; *Clunet*, J. de Dr. Int. Privé, Paris; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain: Parliamentary Papers, *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *L'Int. Sc.*, L'Internationalism Scientifique, The Hague; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil générale de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs G.*, Reichs-Gesetzblatt, Berlin; *Staats.*, Staatsblad, Groningen; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty Ser.*, Great Britain: Treaty Series.

November, 1911.

- 6-30 GREAT BRITAIN — PORTUGAL. Agreement regarding the boundary on the Ruu and Shire Rivers in East Africa. *Treaty ser.*, No. 10, 1912.
- 29 FRANCE — RUSSIA. Convention signed at Paris for the protection of artistic and literary works. *J. O.*, April 17.

January, 1912.

- 5 CENTRAL AMERICAN REPUBLICS. Convention signed at Managua relative to annual reports to future Central American conferences. *El Guatemaltico*, June 1.
- 5 CENTRAL AMERICAN REPUBLICS. Convention signed at Managua to regulate the United Central-American Consular Service. *El Guatemaltico*, June 1.
- 9 CENTRAL AMERICAN REPUBLICS. Convention signed at Managua for the perfection and security of the telegraph service between the different Republics of Central America. *El Guatemaltico*, June 1.

January, 1912.

- 10 CENTRAL AMERICAN REPUBLICS. Convention signed at Managua to establish in Central America the service of telegraph and postal drafts. *El Guatemaltico*, June 1.
- 10 CENTRAL AMERICAN REPUBLICS. Convention signed at Managua for the improvement of maritime communications in Central America. *El Guatemaltico*, June 1.
- 10 CENTRAL AMERICAN REPUBLICS. Convention signed at Managua for the establishment of international routes of communication. *El Guatemaltico*, June 1.
- 11 CENTRAL AMERICAN REPUBLICS. Convention signed at Managua for the establishment of commissions of Central American relations. *El Guatemaltico*, June 1.
- 15 DENMARK-LUXEMBURG. Convention signed at Copenhagen and Luxembourg relative to the transmission of commissions rogatory and judicial acts. *R. de dr. int. privé*, 8:218.
- 20-27 SECOND CONGRESS OF THE FAR EASTERN ASSOCIATION OF TROPICAL MEDICINE met at Hong Kong. *L'Int. Sc.*, (234).

February, 1912.

- 1-14 RUSSIA — SPAIN. Exchange at St. Petersburg of notes relative to reciprocally favorable treatment of vessels of one in ports of the other. *Ga. de Madrid*, March 27.
- 2 FRANCE — GERMANY. Agreement signed at Berlin to determine the nationality of the French, German and Native inhabitants of the territory exchanged in the French Congo and the German Conventions by the convention of November 4, 1911. *Times*, February 3.
- 5 FRANCE — GREAT BRITAIN. Agreement signed at Paris regulating the telephone service between the two countries. *Treaty ser.*, No. 8, 1912.
- 5 FRANCE — NETHERLANDS. Netherlands Law ratifying the convention signed at Paris, February 11, 1911, respecting the adoption of impecunious imbeciles and old subjects. *Staats.*, No. 24, 1912.
- 12 BRAZIL — ECUADOR. Ratifications exchanged at Quito of arbitration treaty signed May 13, 1909, at Washington. *P. A. U.*, 34: 702.

February, 1912.

- 12 CHINA. Decrees and edicts of abdication issued. Yuan Shi Kai was inaugurated as President at Peking, March 10. *North China Herald*, 102:439, 454; Chirol: *The Chinese Revolution, Quarterly R.*, 216:536-553; Bland: *The Yellow Peril, Nineteenth Century and After*, 71:1017-1028; *Times*, February 12; *Cd.*, 6148; Financial and Historical Review of the Chinese Revolution, *Far Eastern R.*, April, 1912; Dillon, *New China and the Regrouping of the Powers, Contemporary R.*, 101:714-736. Secretary Knox's note on China to the German Ambassador (February 3) in *Independent*, 72:333.
- 17 ARGENTINE — PARAGUAY. Protocol signed establishing diplomatic relations. *P. A. U.*, 34:709.
- 17 ITALY — SPAIN. Exchange of ratifications at Madrid, of the arbitration convention signed at San Sebastian, September 2, 1910. *Ga. de Madrid*, February 27.
- 20 (circ.) BULGARIA — RUSSIA. Treaty signed at Sofia, regarding the payment to Russia of 10,680,250 roubles, of the cost of her occupation of Eastern Rumelia. *Times*, February 21.

March, 1912.

- 5 PERSIA — TURKEY. The boundary commission began its meetings at Constantinople. *Times*, March 21.
- 12 BELGIUM — FRANCE. Convention signed at Paris instituting special telegraphic service between the two countries. *J. O.*, April 14.
- 12 FRANCE — GERMANY. Exchange of ratifications at Paris of the conventions signed November 4, 1911 (q. v.), at Berlin. *Times*, March 13. Texts in *Clunet*, 39:946, 963.
- 17 INTERNATIONAL. Protocol signed at Brussels concerning the prolongation of the International Union constituted by the Sugar Convention of March 5, 1902. *Cd.*, 6146; *Reichs. G.*, No. 21; *J. O.*, April 17; *B. Usuel*, March 27.
- 21 BOLIVIA-COLOMBIA. Treaty of peace signed at La Paz. *P. A. U.*, 34:836.
- 25 INTERNATIONAL MARITIME CONFERENCE opened at St. Petersburg. *Times*, March 26.
- 25 INTERNATIONAL CONFERENCE FOR SECURITY ON RAILWAYS opened at St. Petersburg. *Mém. dipl.*, 50:194.

March, 1912.

- 25-29 INTERNATIONAL COMMISSION TO SELECT A RADIUM STANDARD met at Paris. *R. Scientifique*, 50:441.
- 28 NICARAGUA — UNITED STATES. Ratifications exchanged at Managua of naturalization convention signed at Managua December 7, 1908; ratified by the President March 1, 1909; by Nicaragua March 28, 1912; proclaimed May 10. *U. S. Treaty ser.*, 566.
- 28 NICARAGUA — UNITED STATES. Ratifications exchanged of Supplementary Convention, Naturalization, signed at Managua, June 17, 1911; ratified by the President, January 24, 1912; by Nicaragua, March 28, 1912; proclaimed May 10, 1912. *U. S. Treaty ser.*, No. 567.
- 30 FRANCE — MOROCCO. Treaty signed at Fez establishing a French protectorate over Morocco. *Times*, April 1, 5.

April, 1912.

- 1-7 TWENTY-FIRST CONGRESS OF ALIENISTS AND NEUROLOGISTS OF FRENCH SPEAKING COUNTRIES met at Tunis. *R. Scientifique*, 50:88.
- 3 AUSTRIA — SPAIN. Spanish Royal Decree establishing reciprocity in matters of intellectual property issued. *Ga. de Madrid*, April 3.
- 3-14 INTERNATIONAL AÉROPLANE EXHIBITION at Berlin. *Daily Consular and Trade Reports*, 15:833-840.
- 3-8 GREAT BRITAIN-HONDURAS. Exchange of notes at Guatemala and Tegucigalpa extending until April 6, 1913, the operation of the treaty of commerce and navigation signed January 21, 1887. *Treaty ser.*, No. 12, 1912.
- 7-14 SIXTEENTH INTERNATIONAL CONGRESS OF ORIENTALISTS met at Athens. *Nation*, 94:488; *Times*, March 27.
- 7-21 INTERNATIONAL EXPOSITION OF AÉRIAL LOCOMOTION met at Moscow. *Daily Consular and Trade Reports*, 15:320.
- 9-11 FOURTH CONGRESS OF DOCTORS OF FRENCH SPEAKING COUNTRIES met at Paris. *R. Scientifique*, 50:344.
- 10 FRANCE — MONACO. A new customs and vicinage convention signed to take the place of that of 1865. *Mém. dipl.*, 50:226.
- 14 SEVENTH INTERNATIONAL CONGRESS OF TUBERCULOSIS met at Rome. *R. Scientifique*, 50:88.
- 14-20 ANTI-TUBERCULOSIS CONGRESS met at Rome. The next congress will be at London in 1917. *Times*, April 15, 22.

April, 1912.

- 16 INTERNATIONAL EXPOSITION OF SOCIAL HYGIENE opened at Rome. *Mém. dipl.*, 50:243.
- 16-19 FIFTH INTERNATIONAL CONGRESS OF EXPERIMENTAL PSYCHOLOGY met at Berlin. *Science*, 35:772.
- 18 ITALY — TURKEY. Dardanelles closed. They were reopened to traffic on May 18. Dorobantz: Les fortifications des Dardanelles, *Q. dipl.*, 33:612-616. Rhodes was occupied by Italians, May 4; alleged peace proposals in *Times*, May 20; Ameen Rihani: The Crisis of Islam, *Forum*, 47:562-570. The Carthage and Manouba questions referred to the Hague Tribunal, *Q. dipl.*, 33:623.
- 23 FRANCE — GREECE. Convention signed at Athens establishing an author's rights in certain theatrical plays in Greece. *Mém. dipl.*, 30:259.
- 23 INTERNATIONAL EXPOSITION OF ART was opened at Venice. *Mém. dipl.*, 50:259.
- 25-27 AMERICAN SOCIETY OF INTERNATIONAL LAW held its sixth annual meeting at Washington.
- 26 BELGIUM — NETHERLANDS. Proclamation of convention signed at Brussels July 19, 1911, regulating the traffic in distilled liquors across the frontier. *Staats.*, No. 152.
- 26 GREAT BRITAIN — UNITED STATES. Exchange of notes confirming the special agreement and Schedule of Claims signed at Washington, August 18, 1910. *Treaty ser.*, No. 11, 1912.
- 27 FRANCE-SPAIN. Exchange of notes at Paris regarding a modification of a treaty signed at Bayonne, June 13, 1903. *J. O.*, May 5.
- 27-November 27. INTERNATIONAL EXPOSITION at Ghent. *American R. of Rs.*, 45:596.

ADHESIONS.

International Institute of Agriculture, Rome:

Chile, *J. O.*, February 1.

Servia, *J. O.*, February 1.

Turkey, *J. O.*, February 1.

The Geneva Convention (Red Cross), July 6, 1906:

Guatemala.

The Hague Conventions, Private International Law, July 17, 1905:

Roumania: Marriage, etc., Interdiction, etc.

Denmark, for the Antilles, *J. O.*, May 4.

International Office of Hygiene, Rome:

Bolivia, sixth category.

Netherlands, *Staats.*, No. 23, March 27.

Circulation of Obscene Literature, Paris, May 4, 1910.

Austria-Hungary, *J. O.*, April 30.

Netherlands, *Staats.*, No. 132, 1912.

Great Britain, for Australia and New Zealand.

International Radiotelegraph Convention, Berlin, November 3, 1906:

Belgium, for the Congo, *J. O.*, February 1.

Japan, *B. Usuel*, March 23.

Austria-Hungary, for Bosnia and Herzegovina, *J. O.*, April 21.

Uruguay, *D. O.*, March 30.

Portugal, *Monit. B.*, January 27.

Egypt, January 20.

Zanzibar (not to additional agreement).

Netherlands for Caracao.

United States, *U. S. Treaty ser.*, No. 568.

Germany, *J. O.*, May 15.

Spain, for Guinea.

Argentine.

International Telegraph Convention, St. Petersburg, July 10-22, 1875.

Morocco, *B. Usuel*, March 14.

South African Union, *J. O.*, May 4.

White Slave Convention, Paris, May 4, 1910.

Netherlands, *Staat.*, No. 133, 1912.

France, *J. O.*, April 7.

OTIS G. STANTON.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

GREAT BRITAIN ¹

Diplomatic services of Great Britain, United States and France, conditions of entry into, and salaries of the respective ambassadors. (Cd. 6100.) 2d.

Extradition treaty between United Kingdom and Greece. Signed at Athens, Sept. 24, 1910. (Treaty series, 1912, No. 6.) 1½d.

Fur seals, Convention between United Kingdom, United States, Japan, and Russia, respecting measures for the preservation and protection of, in the North Pacific Ocean. Signed at Washington, July 7, 1911. (Treaty series, 1912, No. 2.) 1½d.

General Act of Brussels, Declaration modifying paragraph 5 of. Signed at Brussels, June 15, 1910. (Treaty series, 1912, No. 5.) 1d.

Germany, Treaty between the United Kingdom and, relating to extradition between certain British protectorates and Germany. Signed at Berlin, Aug. 17, 1911. (Treaty series, 1912, No. 3.) 1d. of July 2, 1890.

International Opium Convention. Signed at The Hague, Jan. 23, 1912. (Cd. 6038.) 3½d.

International questions, treatment of, by parliaments in European countries, the United States and Japan. (Cd. 6102.) 4½d.

International Sugar Commission, Report of British delegate to the, February, 1912. (Cd. 6078.) 1½d.

Land in Crown colonies and protectorates, Return showing area, ownership, restriction on alienation, and other particulars with regard to. (H. of C. Reports and Papers, Sess. 1912, No. 68.) 5½d.

Persia. Joint note addressed by the British and Russian representatives at Teheran to Persian Government on Sept. 11, 1907. (Cd. 6077.) 1d.

Persia. Notes exchanged between Persian Government and British and Russian ministers at Teheran, Feb. 18-March 20, 1912. (Cd. 6103.) 1½d.

¹ Official publications of Great Britain and many of the British colonies may be purchased of Wyman & Sons, Ltd., Fetter Lane, E. C., London, England.

Persia, Further correspondence respecting the affairs of. [January to September, 1911.] (Cd. 6104.) 1s. 11d.

———. [October to December, 1911.] (Cd. 6105.) 1s. 8d.

Postal rates between New Zealand and French Oceania, Agreement between United Kingdom and France respecting. Signed at Paris, Dec. 29, 1911. (Treaty series, 1912, No. 7.) 1d.

Telephone service between United Kingdom and France, Agreement regulating. (Treaty series, 1912, No. 8.) 1d.

UNITED STATES ²

Aliens. Report favoring H. 22527 to further restrict admission of, into United States. April 16, 1912. 7 p. (H. rp. 559. Pt. 1.) Views of minority (Pt. 2). April 25, 1912. *Comm. on Immigration and Naturalization*.

Arbitration treaties, general, with Great Britain and France, ratified by Senate March 5, 1912, calendar day March 7, 1912, with resolutions of ratification thereon. 17 p. (S. doc. 476.) Paper, 5c.

Arbitration treaties and conventions submitted to and acted upon by Senate, list of. Feb. 29, 1912. 7 p. (S. doc. 373.) Paper, 5c.

Carnegie Endowment for International Peace, Report favoring H. 1314 to incorporate. Jan. 30, 1912. 2 p. (H. rp. 287.) *House Judiciary Comm.*

China, Report favoring H. J. R. 254, congratulating people of, on their assumption of powers, duties, and responsibilities of self-government. Feb. 28, 1912. 7 p. (H. rp. 368.) *Foreign Affairs Committee*.

Claims. French spoliations, condensed report of findings of Court of Claims. 1912. 187 p. *Senate Claims Comm.*

Costa Rica, Naturalization convention between United States and; signed San Jose, June 10, 1911. 3 p. (Sen. Ex. J., 62d Cong. 1st sess.)

Foreign relations, Papers relating to, with annual message of President, 1908. 1912. ci+848 p. Cloth, \$1.00; paper, 80c. Same (H. doc. 1040, 60th Cong. 2d sess.).

Foreign service, improvement of. Hearings on H. 20044. 1912. ii+160 p. *Foreign Affairs Committee*.

² When prices are given, the document in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Fur seals and sea otter, Report amending H. 16571, to give effect to convention between United States, Great Britain, Japan and Russia for preservation and protection of, concluded July 7, 1911. Feb. 3, 1912. 29 p. (H. rp. 295.) Paper, 5c.

Fur seals and sea otter, Report amending H. 16571, to give effect to convention between United States, Great Britain, Japan, and Russia for preservation and protection of, concluded at Washington July 7, 1911. March 22, 1912. 2 p. (S. rp. 501.) *Foreign Relations Committee*.

Immigration, Hearings relative to further restriction of. 1912. Parts 1, 2, 3, 4, 5. *Comm. on Immigration and Naturalization*.

Immigration and emigration. Table showing European immigration, by race or people, into United States from 1899 to 1909. March 11, 1912. 1 p. (S. doc. 401.) *Senate*.

Industrial Property, International Union for Protection of, Convention signed at Washington, June 2, 1911, by plenipotentiaries of governments forming, revising Paris convention of March 20, 1883, as modified by additional act signed at Brussels, Dec. 14, 1900. 20 p. (Senate Ex. A.)

International Congress of Chambers of Commerce and commercial and industrial associations, Report favoring H. J. R. 234, making provision for, to be held at Boston, Mass., Sept. 24-28, 1912; with hearings. March 21, 1912. 29 p. (H. rp. 438.) *Foreign Affairs Committee*.

International Council for Exploration of the Sea, Report favoring H. J. R. 223 for participation by United States in. Feb. 15, 1912. 20 p. (H. rp. 325.) Paper, 5c.

International Joint Commission, United States and Canada. Rules of procedure adopted pursuant to Art. 12 of treaty between United States and Great Britain, signed Jan. 11, 1909. Feb. 2, 1912. 10 p. *International Joint Comm. on Boundary Waters Between United States and Canada*.

———. Same. [with treaty and laws of United States and Canada relating thereto]. Feb. 2, 1912. 33 p. Paper, 5c.

International Prison Commission, Report favoring H. J. R. 251, for participation of United States in councils of; with hearings. March 21, 1912. 6 p. (H. rp. 437.) *Foreign Affairs Committee*.

International radio telegraph convention of Berlin, 1906, and propositions for international radio telegraph conference of London. 1912. p 1-2+1. 3-114. Paper, 15c.

International wireless telegraphy, Hearing on convention, with

service regulations, supplementary agreement, and final protocol, signed at Berlin, Nov. 3, 1906, by delegates of United States and other Powers; Feb. 21, 1912. 43 p. *Foreign Relations Committee.*

Interparliamentary Union, Report favoring H. 19239, authorizing appropriation for. March 26, 1912. 11 p. (H. rp. 445.) *Foreign Affairs Committee.*

Lane routes for trans-Atlantic steamships, Report favoring H. J. R. 297 for international agreement to establish. April 20, 1912. 4 p. (H. rp. 580.) *Comm. on Merchant Marine and Fisheries.*

Laws and regulations of Norway relative to life-saving appliances and their use on ships. 1912. 15 p. *Commerce Comm.*

Mexico, proclamation relating to disturbances in. March 2, 1912. 2 p. (No. 1184.) *State Dept.*

Mexico. Report favoring H. J. R. 255, to investigate claims of American citizens growing out of late insurrection in Mexico, determine amounts due, if any, and press them for payment. April 15, 1912. 15 p. (H. rp. 556.) Paper, 5c.

Naturalization laws, Report favoring H. 20195 to amend, relative to naturalization of aliens serving in Army, Navy, Marine Corps, or Revenue-Cutter Service. Feb. 20, 1912. 4 p. (H. rp. 336.) *Immigration and Naturalization Comm.*

Niagara Falls. Act extending operation of Act for control and regulation of waters of Niagara River and preservation of Niagara Falls. Approved April 5, 1912. (Public No. 24.) 1 p. 5c.

Niagara Falls, Preservation of. Hearings, Jan. 16-27, 1912, on H. 6746 and 7694, to give effect to 5th article of treaty between United States and Great Britain, signed Jan. 11, 1909. [2]+3+447 p. 4 pl. 6 p. of pl. map. *Foreign Affairs Committee.*

North Atlantic Coast Fisheries: Proceedings in arbitration before the Permanent Court of Arbitration at The Hague. Vols. 1-3. (S. doc. 870, 61st Cong. 3d sess.) Paper. Vol. 1, Final report of agent of United States, Protocols of arbitration, Award of tribunal, and Dissenting opinion of Dr. Drago on question 5, Case of United States, 30c; Vols. 2 and 3, Parts 1 and 2 of Appendix to case of United States, 45c each. Vol. 7, Counter case of Great Britain and appendix, paper, 35c; Vol. 8, Printed arguments of United States and Great Britain, paper, 30c.

Norwegian regulations respecting means of saving life at sea. 1912. 13 p. *Comm. on Merchant Marine and Fisheries.*

Panama, Hearings on Rainey resolution relating to investigation of

attitude of United States in recognizing independence of, Jan. 26-Feb. 20, 1912. [5]+686 p. (No. 1-4.) *Foreign Affairs Committee*.

Panama Canal, Hearings relating to investigations made as to progress of canal and to determine what requirements are on Canal Zone in order that proper legislation may be enacted. 1912. v. 3-5 [vi]+805-1127 p. *Interstate and Foreign Commerce Committee*.

Panama Canal, Report favoring H. 21969, for opening, maintenance, protection, and operation of Panama Canal, and sanitation and government of Canal Zone. March 16, 1912. 13 p. (H. rp. 423, Pt. 1.) Paper, 5c. Views of minority, Pt. 2, 16 p. March 20, 1912.

Panama Canal, Hearing on H. 21969 for opening, maintenance, protection, and operation of, and sanitation and government of Canal Zone. 1912. Pts. 2-5. [viii]+15-164 p. Statement of George W. Goethals, March 29, 1912. 15 p. *Comm. on Interoceanic Canals*.

Panama-Pacific International Exposition, proclamation. Feb. 2, 1912. 1 p. (No. 1178.) *State Dept.*

Peace, Universal. Report amending H. J. R. 66 to amend joint resolution authorizing appointment of commission in relation to. April 23, 1912. 2 p. (H. rp. 589.) *Foreign Affairs Committee*.

Philippine Islands, An act to enable certain classes of Filipinos and aliens to become citizens of. March 23, 1912. (Public No. 109.)

Philippines. Report amending H. 22143 to establish qualified independent government for Philippines and to fix date when such qualified independence shall become absolute and complete. April 26, 1912. 18 p. (H. rp. 606. Pt. 1.) Views of minority (Pt. 2). April 29, 1912. *Comm. on Insular Affairs*.

Porto Rico, Report favoring H. 20048, declaring that all citizens of, and certain natives permanently residing in said island shall be citizens of United States. Feb. 20, 1912. 3 p. (H. rp. 341.) *Insular Affairs Comm.*

Public debt of Virginia. Hearings on H. J. R. 74, expressing sense of Congress that Government should pay that part of public debt of Virginia existing at time of separation of West Virginia therefrom which, under rules of equity, may be chargeable to territory composing said West Virginia. April 24, 1912. 26 p. *House Judiciary Comm.*

Radio communication, Hearings on H. 15357 to regulate. 1912. 126 p. il. *Comm. on Merchant Marine and Fisheries*. Report amending. April 20, 1912. 21 p. (H. rp. 582.) *Comm. on Merchant Marine and Fisheries*.

Radio communication, Hearing before subcommittee on S. 3620 and 5334, to regulate. March 1, 1912. 147 p. il. *Commerce Committee*.

Radio communication. Report amending S. 3815, to amend act to require apparatus and operators for radio communication on certain ocean steamers. April 29, 1912. 2 p. (S. rp. 680.) *Senate Commerce Comm.*

Reciprocal trade relations with Canada, Report amending S. 3316 to repeal act to promote. March 28, 1912. 1 p. (S. rp. 511.) *S. Finance Comm.*

Red Cross, American National. Act for use of, in aid of land and naval forces in time of actual or threatened war. Approved April 24, 1912. (Public No. 132.) 1 p. 5c.

Salvage law, Report amending S. 4930, to harmonize, with provisions of international convention adopted at Brussels, September, 1910. March 12, 1912. 2 p. (S. rp. 477.) *Foreign Relations Committee*.

Seal fisheries of Alaska, Report favoring H. 20047 for protection and regulation of. Feb. 13, 1912. 7 p. (H. rp. 321.) Paper, 5c.

Titanic disaster, hearing before sub-committee pursuant to S. R. 283, directing committee to investigate causes leading to. 1912. Pts. 1-5. [xix]+1-462 p. *Commerce Comm.*

GEORGE A. FINCH.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

ITALY V. PERU

THE PERMANENT COURT OF ARBITRATION AT THE HAGUE

Award rendered May 3, 1912, by the Arbitral Tribunal charged with passing on the difference between Italy and Peru in regard to the claim of the Canevaro brothers.

Whereas, under an agreement to arbitrate dated April 25, 1910, the Italian and Peruvian Governments agreed to submit the following questions to arbitration:

Ought the Peruvian Government to pay in coin, or in accordance with the provisions of the Peruvian law on the domestic debt of June 12, 1889, the drafts (*lettres a ordre, cambiali, libramientos*) now in the possession of the brothers Napoleon, Carlo, and Raphael Canevaro, and which were drawn by the Peruvian Government to the order of the firm of Jose Canevaro & Sons for the sum of 43,140 pounds sterling, plus the legal interest on the said amount?

Have the Canevaro brothers a right to demand the total of the amount claimed?

Has Count Raphael Canevaro a right to be considered as an Italian claimant?

And whereas, in pursuance of this agreement to arbitrate, the following persons were designated as arbitrators:

Mr. Louis Renault, Minister Plenipotentiary, Member of the Institute, Professor in the Faculty of Law at the University of Paris and at the School of Political Sciences, Jurisconsult of the Ministry of Foreign Affairs, President;

Mr. Guido Fusinato, Doctor of Law, former Minister of Public Instruction, Honorary Professor of International Law at the University of Turin, Deputy, Counselor of State;

His Excellency Mr. Manuel Alvarez Calderon, Doctor of Law, Professor at the University of Lima, Envoy Extraordinary and Minister Plenipotentiary of Peru at Brussels and Berne.

And whereas, the two governments have respectively appointed as counsel:

The Royal Italian Government: Professor Vittorio Scialoja, Senator of the Kingdom of Italy and, as assistant counsel, Count Giuseppe Francesco Canevaro, Doctor of Law;

The Peruvian Government: Mr. Manuel Maria Mescones, Doctor of Law, Attorney.

And whereas, in accordance with the terms of the agreement, the memoirs and counter-memoirs have been duly exchanged between the parties and communicated to the arbitrators;

And whereas, the tribunal met at The Hague on April 20, 1912.

And whereas, in order to simplify the statement to follow, it is best to pass first on the third question propounded in the agreement, that is, regarding the status of Raphael Canevaro;

And whereas, according to Peruvian legislation (Art. 34 of the Constitution), Raphael Canevaro is a Peruvian by birth because born on Peruvian territory,

And, on the other hand, the Italian legislation (Art. 4 of the Civil Code) assigns to him Italian nationality because he was born of an Italian father;

And whereas, as a matter of fact, Raphael Canevaro has on several occasions acted as a Peruvian citizen, both by running as a candidate for the Senate, where none are admitted except Peruvian citizens and where he went to defend his election, and also especially by accepting the office of Consul General of the Netherlands, after soliciting the authorization of the Peruvian Government and then of the Peruvian Congress;

And whereas, under these circumstances, whatever Raphael Canevaro's status may be in Italy with respect to his nationality, the Government of Peru has a right to consider him as a Peruvian citizen and to deny his status as an Italian claimant.

And whereas, the debt (*creance*) which gave rise to the claim submitted to the tribunal arises from a decree of the dictator Pierola of December 12, 1880, by virtue of which there were created, under date of the 23rd of the same month, pay checks (*bons de paiement, libramientos*) to the order of the firm of Jose Canevaro & Sons for the sum of 77,000 pounds sterling, payable at different periods;

And these "checks" were not paid at the periods set, which coincided with the hostile occupation;

And, as a payment on account of 35,000 pounds sterling was made

at London in 1885, there remains a debt of 43,140 pounds sterling in regard to whose fate it is necessary to pass judgment;

And whereas, it is shown from the facts of the case that the business firm of Jose Canevaro & Sons, established at Lima, was restored in 1885 after the death of its founder, which occurred in 1883;

And this firm did preserve the firm name of Jose Canevaro & Sons, but in reality, as shown by the act of liquidation of February 6, 1905, it was composed of Jose Francisco and Cesar Canevaro, whose Peruvian nationality was never contested, and of Raphael Canevaro, whose said nationality, in accordance with the law of Peru, has just been recognized by the tribunal;

And this company, which was Peruvian in two respects — by virtue of its firm name and of the nationality of its members, continued to exist until the death of Jose Francisco Canevaro, which occurred in 1900;

And whereas it was during the existence of this company that the Peruvian laws of October 26, 1886, June 12, 1889, and December 17, 1898, were enacted, which laws prescribed the gravest measures in regard to the debts of the Peruvian Government, these measures appearing to be necessitated by the disastrous condition to which Peru had been reduced by the evils of foreign and civil war;

And whereas, it is not the place of the tribunal to judge the provisions of the laws of 1889 and 1898 themselves, which provisions were indeed very severe on the creditors of Peru, but as these provisions were imposed without any doubt on Peruvian individuals and Peruvian corporations alike, this is merely a fact the tribunal can but recognize.

And whereas, on September 30, 1890, the Canevaro company, through its representative Giacometti, applied to the Senate in order to secure the payment of the 43,140 pounds sterling which had according to it been furnished for the purpose of meeting the needs of the war;

And on April 9, 1891, in a letter addressed to the President of the Tribunal of Accounts, Giacometti assigned a triple origin to the debt: a balance due the Canevaro firm from the government in payment of armaments bought in Europe during the war; drafts drawn by the government against the consignment of guano to the United States, protested and paid by Jose Francisco Canevaro; money furnished for the army by General Canevaro;

And finally, on April 1, 1891, the said Giacometti, again addressing the President of the Tribunal of Accounts, invoked Article 14 of the

law of June 12, 1889, which he said Congress had passed "for the most patriotic purposes," in order to obtain a settlement of the debt;

And whereas, the representative of the Canevaro firm had at first assigned a manifestly erroneous origin to the debt, it having by no means been a question of supplies furnished or advances made in view of the war against Chile, but, as was recognized later on, solely of the repayment of previous drafts which, drawn by the Peruvian Government, had been protested and then paid by the Canevaro firm;

And this is the standpoint from which the matter should be examined.

And whereas, the Canevaro firm acknowledged in 1890 and 1891 that it was subject to the law on the domestic debt, and it merely sought to place itself in a position where it might take advantage of a favorable provision of this law instead of submitting to the common fate of the creditors;

And its claim (*creance*) does not come within the provisions of Article 14 of said law which it invoked, as was said above; and it is not a question, in this case, of a deposit received by the government, nor of bills of exchange (drafts) drawn upon the government, accepted by it, and acknowledged to be lawful by the "present" government, but of an operation connected with accounts and not being for the purpose of procuring resources for the government, but of settling a previous debt;

And the Canevaro claim does, on the contrary, come within the very comprehensive terms of Article 1, No. 4, of the law which mention the pay orders (*libramientos*), bonds (*bons*), checks, bills and other orders to pay issued by the national bureaux *up to January, 1880*; and we may, as a matter of fact, offer the objection that it would seem that this phrase ought to leave out the Canevaro claim, which is of December 23, 1880; but it is important to remark that this limitation as to the date was for the purpose of excluding claims arising from acts of the dictator Pierola, in accordance with the law of 1886 which declared all the acts of the latter to be void; and thus, construing the provision in question literally, the Canevaro claim could not be invoked on any score, even in order to obtain the slight portion allowed by the law of 1889;

But whereas, on the one hand it appears from the circumstances and from the terms of the agreement to arbitrate that the Peruvian Government itself acknowledges that the annulment prescribed by the law of 1886 does not apply to the Canevaro claim; and, on the other hand, the annulment prescribed by the Pierola decree would leave intact the previous claim arising from the payment of the drafts;

And thus the claim arising from the bonds of 1880, delivered to the Canevaro firm, must be considered as coming within the category of the evidences of debt enumerated in Article 1, No. 4 of the law.

And whereas it has been held in a general way that the Canevaro debt ought not to suffer the application of the law of 1889, and that it could not be considered as coming within *the domestic debt* because all its characteristics argued against this, the certificate being to order, made payable in pounds sterling, and belonging to Italians;

And whereas, apart from the nationality of the persons (involved), we know that financial measures taken inside a country do not affect the acts concluded outside and by which the government has appealed directly to foreign credit; but such is not the case in this instance, for it is a question, in the case of the certificates issued in December, 1880, of a settlement of a domestic nature of evidences of debt created at Lima and payable at Lima, in compensation for a payment made voluntarily in behalf of the Peruvian Government;

And this fact is not impaired by the circumstances that the evidences of debt were to order and payable in pounds sterling, which circumstances did not prevent the Peruvian law from being applicable to evidences of debt created and payable in the territory in which said law governed;

And the enumeration contained in Article 1, No. 4, as referred to above, comprises evidences of indebtedness payable to order, and Article 5 foresees that there may be conversions of money to be made;

And finally as has been stated before, when the financial measures which have given rise to the claim were taken, the claim belonged to a company which was incontestably Peruvian.

And whereas, the claim of 1880 belongs at present to the three Canevaro brothers, two of whom are certainly Italians;

And one is justified in wondering whether this circumstance renders the law of 1889 inapplicable;

And whereas, the tribunal need not inquire what decision should be reached if the claim had belonged to Italians at the time the law was enacted which reduced to so large an extent the rights of the creditors of Peru, and whether the same sacrifices could be imposed on foreigners as on natives;

But at present it is solely a question of ascertaining whether the situation in which natives are placed, and which they have to accept, will be radically modified because foreigners are substituted for natives in one form or another;

And such a modification could not easily be admitted, since it would be contrary to the plain proposition that a person who receives rights has no greater rights than those of the person from whom he receives his rights.

And whereas the Canevaro brothers appear as holding the disputed evidences of indebtedness by virtue of an indorsement;

And there is invoked in their behalf the ordinary effect of indorsement, which is to cause the bearer of a note to order to be considered as the direct creditor of the debtor, so that he may repel any exceptions that might have been made against his indorser;

And whereas, even if we reject the theory that outside of negotiable paper indorsement is a purely civil (law) conveyance, we must in this instance refuse to admit the effect attributed to the indorsement;

And as a matter of fact, while the date of the indorsement of the evidences of debt of 1880 is not known, it is an indisputable fact that this indorsement occurred long after the paper became due; and there is therefore ground for applying the provision of the Peruvian code of commerce of 1902 (Art. 436), according to which indorsement subsequent to maturity is to have the force only of an ordinary conveyance;

And, moreover, the rule invoked above in regard to the effect of indorsement does not prevent making against the bearer the exceptions drawn from the very nature of the paper, which he knew or ought to have known; and it is useless to remark that the Canevaro brothers knew perfectly well the character of the papers indorsed in their behalf.

And whereas, while the Canevaro brothers can not, as possessors of the claim by virtue of an indorsement, aspire to a more favorable status than that of the company from which they derive their rights, it is a question whether their status ought not to be different if we regard them as heirs of Jose Francisco Canevaro, as they appear in a notarial declaration of February 6, 1905;

And as a matter of fact there is this difference between a conveyance and inheritance, that in the latter case the claim has not passed by a pure act of the will from one person to another;

And nevertheless no decisive reason is found for admitting that the situation has changed by virtue of the fact that Italians succeeded a Peruvian and that the heirs have a new title which enables them to avail themselves of the claim under more favorable conditions than the *de cujus*.

And it is a general rule that heirs receive property in the condition it was in when in the possession of the decedent.

And whereas, finally, it has been maintained that the Peruvian law of 1889 on the domestic debt did not change the claims existing against Peru, but simply gave the government the privilege of discharging its debts in a certain manner when the creditors should demand the payment thereof, and we should examine the question at the time the payment was demanded in order to ascertain whether the exception arising from the law may be invoked against all persons, especially against foreigners;

And, as the present owners of the claim are Italians, it would be proper for the tribunal to pass on the question whether the Peruvian law of 1889 may in spite of its exceptional character be imposed on foreigners;

But whereas this view appears to be in disagreement with the general terms and spirit of the law of 1889;

And Congress, whose acts themselves are not here under examination, intended to liquidate completely the financial situation of Peru and substitute the bonds which it created for the old bonds;

And this situation can not be modified (simply) because some creditors appear earlier than others for the settlement of their claims;

And this was the situation of the Canevaro firm, which was Peruvian at the time the law of 1889 went into force, and, for the reasons already set forth, this situation has not been changed in law by the fact that the claim passed into the hands of Italians by indorsement or by inheritance.

And whereas, finally, it has been alleged that the Peruvian Government ought to indemnify the claimants for the injury caused them by its delay in discharging the debt of 1880, and that the injury consists in the difference between the payment of the consolidated debt in gold and its payment in bonds; and thus the Peruvian Government would be obliged to pay in gold the amount claimed, even admitting that the law of 1889 was properly (regularly) applied to the claim;

And whereas the tribunal thinks that if it were to follow this line of thought it would be departing from the terms of the agreement to arbitrate, which instructs it solely to decide whether the Peruvian Government ought to pay in cash *or* in accordance with the provisions of the Peruvian law of June 12, 1889; and as the tribunal has admitted the latter alternative, the former solution ought to be excluded; and it (the tribunal) is not charged with judging what responsibility the Peruvian

Government may have incurred on any other score, and especially with inquiring whether the delay in paying may or may not be excused by the difficult circumstances under which it was laboring, especially in view of the fact that it would in reality be a question of responsibility incurred toward a Peruvian firm which was the creditor when the delay took place.

And whereas it is proper to seek what the amount of the Canevaro claim was at the time the law of 1889 went into force;

And it was composed primarily of the principal, amounting to 43,140 pounds sterling, but to this must be added the interest which had accrued up to that time;

And the interest, which according to the decree of December 23, 1880, was 4% per annum up to the respective maturities of the bonds delivered, and which was comprised in the amount of these bonds, ought from the said maturity dates to be calculated at the legal rate of 6% (Art. 1274 of the Peruvian Civil Code) up to January 1, 1889;

And we thus obtain the sum of 16,577 pounds 2 shillings 2 pence sterling, which must be added to the principal in order to make up the total amount to be paid back in certificates (bonds) of the consolidated debt and to yield 1% interest payable in gold from January 1, 1889, until final payment;

And whereas, according to what was decided above in regard to the situation of Raphael Canevaro, the tribunal is to pass judgment only in regard to his two brothers.

And whereas it is the duty of the tribunal to regulate the mode of executing the award.

Therefore,

The arbitral tribunal decides that the Peruvian Government shall, on July 31, 1912, deliver to the Italian Legation at Lima, on account of the brothers Napoleon and Carlo Canevaro:

1. In bonds of the domestic (1%) debt of 1889, the nominal amount of 39,811 pounds 8 shillings and 1 penny sterling upon the surrender of two-thirds of the bonds delivered on December 23, 1880, to the firm of Jose Canevaro & Sons;

2. In gold, the sum of 9,388 pounds 17 shillings 1 penny sterling, constituting the interest at 1% from January 1, 1889, to July 31, 1912.

The Peruvian Government may delay the payment of this latter sum until January 1, 1913, provided it pays interest thereon at the rate of 6% from August 1, 1912.

Done at The Hague, in the mansion of the Permanent Court of Arbitration, on May 3, 1912.

LOUIS RENAULT, *President*.

MICHIELS VAN VERDUYNEN, *Secretary General*.

KER AND COMPANY V. ALBERT R. COUDEN

Supreme Court of the United States.

February 19, 1912

Mr. Justice HOLMES delivered the opinion of the court:

This is an action brought by Ker and Company to recover possession of land held by the defendant under a claim of title in the United States. The land is the present extremity of Sangley Point, in the Province of Cavite and island of Luzon, projecting into Manila Bay. It has been formed gradually by action of the sea; all of it since 1811, about three-quarters since 1856, and a part since 1871. For a long time the property was used by the Spanish navy and it now is occupied by the present government as a naval station, works costing more than half a million dollars having been erected upon it. The plaintiffs claim title under conveyances from the owner of the upland. The Philippine courts held that under the Partidas, III., Tit. 28, Laws 3, 4, 6, 24 and 26, and the Law of Waters of 1866, the title to the accretions remained in the government, and the vexed question has been brought to this court.

That the question is a vexed one is shown not only by the different views of Spanish commentators but by the contrary provisions of modern codes and by the occasional intimations of the doctors of the Roman law. Justinian's Institutes, 2, 1, 20 (Gaius II. 70), followed by the Partidas, 3, 28, 26, give the alluvial increase of river banks to the owner of the bank. If this is to be taken as an example illustrating a general principle there is an end of the matter. But the Roman law is not like a deed or a modern code prepared *uno flatu*. History plays too large a part to make it safe to generalize from a single passage in so easy a fashion. Alongside of the rule as to rivers we find that the right of alluvion is not recognized for lakes and ponds, D. 41, 1, 12, a rule often repeated in the civil law codes. *e. g.* Philippine Civil Code of 1889, Arts. 366, 367. Code Napoleon, Art. 550. Italy, Civil Code, 1865, Art. 454. Mexico, Art. 797. If we are to generalize, the analogy of lakes

to the sea is closer than that of rivers. — We find further that *In agris limitatis jus alluvionis locum non habet*. And the right of alluvion is denied for the *agrum manu captum*, which was *limitatum* in order that it might be known (exactly) what was granted. D. 41, 1, 16. The gloss of Accursius treats this as the reason for denying the *jus alluvionis*. If this reason again were generalized, it might lead to a contrary result from the passage in the Institutes. Grotius treats the whole matter as arbitrary to be governed by local rules, and both the doctrine as to rivers and the distinction as to accurately bounded lands as rational enough. De J. B. & P. Lib. 2, cap. 8, 11, 12. A respectable modern writer thinks that it was a mistake to preserve the passage concerning definitely bounded grants in the Digest, 1 Demangeat, Droit Romain, 2d ed. 441 ('anti-quirt' Puchta, Pandekten, § 165), but so far as we have observed this is an exceptional view, and from the older commentators that we have examined down to the late brilliant and admirable work of Girard, Droit Romain, 4th ed. 324, this passage seems to be accepted as a part of the law. At all events it shows that, as we have said, it is unsafe to go much beyond what we find in the books. And to illustrate a little further the uncertainty as to the Roman doctrine we may add that Donellus mentions the opinion that alluvion from the sea goes to the private owner only to remark that the texts cited do not support it, De Jur. Civ. IV, c. 27, 1 Opera (ed. 1828), 839 n., and treats the rule of the Institutes as peculiar to rivers, as also Vinnius in his comment on the passage stating the rule seems to do, while Huberus, on the other hand, thinks that rivers furnish the principle that ought to prevail. Praelectiones, II., Tit. 1, 34.

The seashore flowed by the tides, unlike the banks of rivers, was public property; in Spain belonging to the sovereign power. Inst. II, Tit. 1, 3, 4, 5. D. 43, 8, 3. Partidas, III., Tit. 28, 3, 4. And it is a somewhat different proposition from that laid down as to rivers if it should be held that a vested title is withdrawn by accessions to what was owned before. Perhaps a stronger argument could be based on the rule that the title to the river bed changes as the river changes its place. Part. III. Tit. 28. Law 31. Inst. 2, 2, 23. D. 41. 1. 7, 5. But we are less concerned with theory than with precedent in a matter like this, whether we agree with Grotius or not in his general view. The Spanish commentators do not help us, as they go little beyond a naked statement one way or the other. It seems to us that the best evidence of the view prevailing in Spain is to be found in the codification which presumably

embodies it. The Law of Waters of 1866, which became effective in the Philippines in September, 1871, and the validity of which we see no reason to doubt, after declaring like the *Partidas* that the shores (*playas*), or spaces alternately covered and uncovered by the sea, are part of the national domain and for public use, Arts. 1, 3, goes on thus: "Art. 4. The lands added to the shores by the accessions and accretions caused by the sea belong to the public domain. When they are not (longer) washed by the waters of the sea, and are not necessary for objects of public utility, nor for the establishment of special industries, nor for the coast guard service, the government shall [will?] declare them property of the adjacent estates, in increase of the same."

Notwithstanding the argument that this article is only a futile declaration concerning accessions to the shore while it remains such in a literal sense, that is, washed by the tide, we think it plain that it includes and principally means additions that turn the shore to dry land. These all remain subject to public ownership unless and until the government shall decide that they are not needed for the purposes mentioned and shall declare them to belong to the adjacent estates. The later provision in Article 9, that the public easement for salvage, &c., shall advance and recede as the sea recedes or advances, simply determines that neither public nor private ownership shall exclude the customary public use from the new place. The Spanish Law of Ports of 1880, like the Law of Waters, asserts the title of the State although it confers private rights when there is no public need.

The presumption that the foregoing provisions of the Law of Waters express the understanding of the codifiers as to what the earlier law had been, becomes almost inexpugnable when we find that the other leading civil law countries have adopted the same doctrine. The Code Napoleon, after laying down the Roman rule for alluvion in rivers, Art. 556, 557, adds at the end of the latter Article: *Ce droit n'a pas lieu à l'égard des relais des la mer*, which seems to have been adopted without controversy at the Conférence. See further Marcadé, *Explication*, 5th ed. vol. 2, p. 439. And compare 2 Hall's *Am. Law Journal*, 307, 324, 329, 333. The Civil Code of Italy, 1865, Art. 454, is to similar effect. See also Chile, Civil Code, Art. 650. The Supreme Court of Louisiana in like manner confines the private acquisition of alluvion to rivers and running streams, and denies the private right in the case of lakes and the sea. *Zeller v. Yacht Club*, 34 La. An. 837. And the provision of the Louisiana Code, Art. 510, is like those of France, Italy

and Spain. The court of first instance below refers to judgments of the Supreme Court of Spain that seems to look in the same direction. We have neither heard nor found anything on the other side that seems to us to approach the foregoing considerations in weight, not to speak of the respect that we must feel for the concurrent opinion of both the courts below upon a matter of local law with which they are accustomed to deal. Of course we are dealing with the law of the Philippines, not with that which prevails in this country, whether of mixed antecedents or the common law.

As the case was brought up on the single question that we have discussed the judgment of the court below must be affirmed.

Judgment affirmed.

Mr. Justice McKENNA, dissenting

I cannot agree with the conclusion of the court. It seems to be conceded that it is not necessarily determined by the authorities which are cited. I think the better deduction from them is that they only declare the constant integrity of the shore, and the dominion of the government over it whether it recede or advance. When it ceases to be washed by the tides or the seas it becomes part of the upland and belongs to the owner of the upland. And this is but the application of the principle, said to be of natural justice, that he who loses by the encroachments of the sea should gain by its recession. *Banks v. Ogden*, 2 Wall. 57, 67.

SUPREME COURT OF THE REPUBLIC OF CUBA ¹

November 28, 1910

I, Licenciado Antonio E. Mesa y Dominguez, Secretario de Gobierno of the Plenary Court and of the Presidency of the Supreme Court of the Island of Cuba, hereby certify that at the session held by the Department of Government of this Supreme Court, on the 26th day of the present month, in which a report was made of the communication from the Secretary of Justice under date of the 21st of the present month, referring to this department the communication of the Department of State under date of the 15th, transmitting a note from the minister of

¹*Gaceta Oficial de la Republica de Cuba*, Nov. 29, 1910, No. 128, Vol. II, p. 5623. Translated from the Spanish by Mr. Antonio M. Opisso, of Washington, D. C.

His British Majesty, dated on the 11th of this month, in which he formulates the petition to which we shall refer later on, a resolution was passed which literally says:

Considering that, besides the fact that it is not proper to pass any opinion as to the justiciable nature of the act which originated the case for embezzlement, No. 1003, of the present year, in one of the courts of the district of Havana, to which facts the above mentioned communication of the Secretary of Justice of November 21st of the present year refers, said act consisting according to the denunciation made by J. Terptru and P. Louy, formerly of the crew of the British steamer, *Celtic Princess*, in the illegal retention by the British consul of the salary which was due to them for services rendered on board of the above-named vessel, since this Department of Government is not authorized to qualify the act denounced as such as the power to make such qualification belongs only to the judge or to the Department of Justice which has jurisdiction over the matter; furthermore, considering, that this department lacks the jurisdiction necessary to consider the same, even for the sole purpose of passing upon the request made regarding the same by the minister of His British Majesty, since this department is not cognizant of the precise terms in which the denunciation was made, and by which, and probably in virtue of other information or proceedings of which this department is likewise ignorant, they have proceeded to the institution of the case and to summon the vice consul as a witness; all of which, at first sight, does not show any lack of respect due to the foreign consular officials, nor do they constitute any violation of the recognized principles of international law, nor can it therefore be considered as a sufficient cause to take any measures in the sense requested by the minister;

Considering that, notwithstanding the fact that it is not proper to acknowledge the act complained of as a justifiable occasion for the object sought, there is no objection, in view of the well known convenience of preventing the possible commission of errors of that nature in the future, to grant the pretensions above referred to which seek to establish the principle that the charges preferred against foreign consular officials should not be admitted by the justice when it is evident that the subject matter of the same is an act executed by the consul in his official character and for which his government is the only one responsible, since, in accordance with the recognized principles of international law, such officials are not subject to the jurisdiction of the courts of the country

wherein they are accredited in all that relates to acts executed in the exercise of their official duties and in the name of the government whom they represent, as so expressed by the minister of His British Majesty as a basis for his claim in the note he addressed to the Secretary of State and referred by the latter to the Secretary of Justice, and by him referred, finally, for its resolution, to the President of this Supreme Court, who, in his turn, has referred it to this department of the government of the same court; therefore, the following notice should be made to the judges:

It is resolved that the judges of instruction and correction of courts of the republic, as well as those judges of the municipal court having correctional jurisdiction, should be, and are hereby, advised that no charges preferred before them against foreign consular officials should be admitted, when it appears that jurisdiction over the matter which is the cause of the denunciation does not fall within the jurisdiction of the Cuban courts on account of being an act executed by the consul in his official capacity and for which only his government is responsible.

For this purpose this resolution must be published in the *Gaceta Oficial* of the Republic, and furthermore communicated to the Secretary of Justice.

And for the publication thereof in the *Gaceta Oficial* of the Republic, I execute these presents in the City of Havana, on the 28th day of November, 1910.

L. ANTONIO E. MESA Y DOMINGUEZ.

BOOK REVIEWS

- Die Abkommen der Haager Friedenskonferenzen, der Londoner Seekriegskonferenz nebst Genfer Konvention.* By Dr. jur. Hans Wehberg. Berlin: J. Guttentag. 1910. ix, 270 pp.
- Sind die Ansprüche der Gebrüder Mannesmann nach Treu und Glauben in vollem Umfange zu rechtfertigen?* By Dr. jur. Hans Wehberg. Tübingen: J. C. B. Mohr. 1910. 34 pp.
- Die internationale Friedensbewegung.* By Dr. jur. Hans Wehberg. M. Gladbach: Volksvereins-Verlag GmbH. 1911. 48 pp.
- Internationale Schiedsgerichtsbarkeit.* By Dr. Hans Wehberg. Berlin: Carl Heymanns. 1910. 52 pp.
- Ein internationaler Gerichtshof für Privatklagen.* By Dr. jur. Hans Wehberg. Berlin: Liebheit & Thiesen. 1911. 35 pp.
- Das Völkerrecht und das italienische Staatsversicherungsmonopol.* By Dr. Hans Wehberg. Vienna: Manzsche k. u. k. Hof-Verlags- und Universitäts-Buchhandlung. 1912. 25 pp.
- Kommentar zu dem Haager "Abkommen betreffend die friedliche Erledigung internationaler Streitigkeiten" vom 18. Oktober, 1907.* By Dr. Hans Wehberg. Tübingen: J. C. B. Mohr. 1911. xi, 185 pp.

Within the last few years no German writer has devoted himself more seriously to some of the great problems of international law and has treated them more brilliantly yet sanely than Dr. Hans Wehberg of Düsseldorf, whose "Commentary" upon the Convention for the Pacific Settlement of International Disputes of October 18, 1907, is the principal subject of the present review. Besides numerous articles in legal periodicals, some of which have been issued as reprints, and not a few brochures, Dr. Wehberg has published within the last three years three separate volumes: *Das Beuterecht im Land-und Seekriege* (1909), translated into English as *Capture in War on Land and Sea*, and favorably reviewed in the January, 1912, number of this JOURNAL, page 252; *Die Abkommen der Haager Friedenskonferenzen, der Londoner Seekriegskonferenz nebst Genfer Konvention* (1910); *Kommentar zu dem Haager Abkommen betreffend die friedliche Erledigung internationaler Streitigkeiten vom 18*

Oktober, 1907 (1911). Each of these is useful, and two of them, namely, *Capture in War on Land and Sea* and the *Commentary upon the Hague Conventions concerning the pacific settlement of international disputes of October 18, 1907*, are distinct contributions to the subjects of which they treat. A fourth, dealing with the problems of a permanent international court is, it is understood, in press and will be published before the present (July) number of the JOURNAL appears.

In view of Dr. Wehberg's remarkable and intelligent activity in certain fields of international law, it is proposed to examine some of his more important articles which have appeared as reprints and two of his brochures, in order to understand his point of approach and the point of view from which the various problems of international law which he treats are discussed. In the volume entitled *Capture in War on Land and Sea*, Dr. Wehberg urges the argument that "a capture of an enemy's commerce as a means of bringing a war to an end was never a good one and is now weaker than ever," and, in the language of the reviewer of this volume, "both introduction and text are vigorous and trenchant attacks on militarism and imperial policies, and especially on the attitude, the dangers and necessities of England as compared with the continental countries in this respect." The reviewer concludes that "the work is, of course, not a text-book for reference, like Bordwell's 'Law of War' or a brief compendium like Phillimore's excellent monograph on booty, but a strong, learned, radical and useful (if not in all parts wholly convincing) plea for the abolition of capture in war on land and sea, and much that is presented is valuable, original and impressive."

Dr. Wehberg appears in this, his earliest elaborate work, as a determined opponent of militarism and imperial policies generally, and in a recent contribution to the *Friedens-Warte* he states frankly that he is not only happy but proud to be a pacifist. (*Friedens-Warte*, May, 1912, p. 179). It is therefore from the standpoint of the convinced pacifist that Dr. Wehberg writes, and the pacifists are to be congratulated upon their brilliant recruit. The personal equation is to be noted and borne in mind in considering Dr. Wehberg's various contributions. There are, however, pacifists and pacifists, and it is therefore necessary to consider his definition of the term and of the peace movement, in order to estimate the value and the importance of his literary activity. In the admirable brochure entitled *Die Internationale Friedensbewegung* (1911), a pamphlet of 47 pages, Dr. Wehberg gives the clearest evidence that, in his opinion, its aims are practical and possible of realization.

Thus, he rejects as wholly untenable the idea of a world-state (page 47) and looks upon this as discarded by the advocates of peace. He does not consider the mere preservation of peace as the aim and purpose of the movement, because the maintenance of peace by large standing armies involves economic waste and blocks the progress of social reform. He looks upon peace as essential to the continuous and orderly development of industry and commerce, and in the internationalization of industry and commerce he finds the best guarantee of peace. He shows clearly that each country is more and more dependent upon its neighbors, that the rapid means of transportation and communication either have made or will make the most distant portions of the world neighbors in the economic sense of the word, that industry and commerce can no longer be confined within national lines, that the attempt of the Italian Government to nationalize and create by law a monopoly of insurance societies threatens the success of Italian institutions of this kind, because the large enterprises, even although they originate and operate principally in any one country, are nevertheless dependent upon foreign capital. This phase of the subject he treats at very considerable length in a contribution entitled *Das Völkerrecht und das italienische Staatsversicherungsmonopol* (1912), which has been reprinted in pamphlet form from the *Österreichische Zeitschrift für öffentliche und private Versicherung*, in which it originally appeared.

These international relations require a law for their regulation and for the settlement of the conflicts that necessarily arise. He therefore devotes very considerable attention to the various economic and commercial unions which have been created and looks upon them as but steps to a larger international organization.

International law is to be developed to meet international needs, when and as they arise, and the Hague Conference is pointed to as the appropriate method for developing this conventional law. But this law requires to be interpreted in such a way as to bind the parties to the conventions creating it, and the conflicts which arise regarding the interpretation or the application of this law, as well as the disputes between nations, are to be adjudicated by a permanent court, which does not need to be constituted for the special case, and whose decisions will bind not merely the parties to the suit but the nations parties to the conventions and international agreements, as well as develop the principles of international law through the adjudication of concrete cases. Dr. Wehberg has, since the publication of his *Texts of the Hague Conferences*

(1910), clarified and developed his ideas on this important subject. For instance, he looked with indifference upon the failure of the project of the Second Hague Conference creating a truly permanent court. Thus he said: "I do not personally regret that this project failed. However much the development may have been toward substitution of the list of the present permanent court by a really permanent judiciary, nevertheless the time did not seem to have been ripe in 1907; above all, the need was lacking." (*Abkommen*, pp. 35-36.)

In his more recent contributions, Dr. Wehberg is a partisan of a truly permanent court which shall decide disputes between nations as national courts decide disputes between individuals whose awards are not to be executed by force, but left to the good faith of the litigating nations. This newer view, which to the reviewer seems incontrovertible, appears in unmistakable terms not only in the *Internationale Friedensbewegung* (1911), *Internationale Schiedsgerichtsbarkeit* (1911), but in an extreme form in an article entitled *Ein internationaler Gerichtshof für Privatklagen* (1911), in which foreign creditors would be given the right to sue debtor states, without the requirement that the governments of the creditors should approve or appear in behalf of their citizens or subjects, and he cites for this, Article 2 of the convention of December 20, 1907, establishing the Central American Court.

The creation of a truly permanent international court has thus become a favorite subject with Dr. Wehberg, and he regards its establishment and successful operation as necessary to any enlightened system of international organization. To get the cases before the court, he advocates treaties of arbitration between the nations and, above all, to use a favorite expression of Baron Marschall von Bieberstein "a mondial treaty," which, however, shall not create such an extensive obligation as treaties between individual states. He regards a willingness to submit cases and a public opinion compelling their submission as infinitely more important than paper agreements, and in this connection he points out the defects in the recent proposed treaties between the United States, Great Britain and France, which have appeared to many observers, but which have, it would appear, not hitherto found expression. Thus, he says that the commission of inquiry proposed by these treaties would withdraw cases from arbitration, and the adjustment reached would be in the nature of a compromise by which "a development of international law would be wholly frustrated and the aim of international arbitration belittled." (*Die internationale Friedensbewegung*, p. 36.)

The Commission on International Law, created by the League of Nations in 1920, was the first international body to study and codify international law. It was composed of representatives from various nations and was tasked with the mission of identifying and resolving legal issues that arose between states. The Commission's work was foundational in the development of modern international law, as it provided a systematic approach to the study and codification of legal principles governing relations between nations. Its efforts led to the creation of numerous treaties and conventions, which have since become the cornerstone of international legal practice. The Commission's legacy is evident in the continued relevance of its work and the ongoing efforts of international legal scholars and institutions to build upon its foundation.

The Commission's work was particularly significant in the area of the law of nations, which governs the relations between states. It addressed a wide range of issues, including the rights and obligations of states, the treatment of aliens, and the resolution of international disputes. The Commission's work was characterized by a commitment to the principles of justice and equity, and its efforts were instrumental in the development of a more orderly and predictable international legal system. The Commission's work was also characterized by a strong emphasis on the importance of international law in the maintenance of peace and stability in the world. Its efforts were a testament to the power of international cooperation and the importance of the rule of law in the international community.

The Commission's work was also characterized by a strong emphasis on the importance of international law in the maintenance of peace and stability in the world. Its efforts were a testament to the power of international cooperation and the importance of the rule of law in the international community. The Commission's work was also characterized by a strong emphasis on the importance of international law in the maintenance of peace and stability in the world. Its efforts were a testament to the power of international cooperation and the importance of the rule of law in the international community.

(1910), clarified and developed his ideas on this important subject. For instance, he looked with indifference upon the failure of the project of the Second Hague Conference creating a truly permanent court. Thus he said: "I do not personally regret that this project failed. However much the development may have been toward substitution of the list of the present permanent court by a really permanent judiciary, nevertheless the time did not seem to have been ripe in 1907; above all, the need was lacking." (*Abkommen*, pp. 35-36.)

In his more recent contributions, Dr. Wehberg is a partisan of a truly permanent court which shall decide disputes between nations as national courts decide disputes between individuals whose awards are not to be executed by force, but left to the good faith of the litigating nations. This newer view, which to the reviewer seems incontrovertible, appears in unmistakable terms not only in the *Internationale Friedensbewegung* (1911), *Internationale Schiedsgerichtsbarkeit* (1911), but in an extreme form in an article entitled *Ein internationaler Gerichtshof für Privatklagen* (1911), in which foreign creditors would be given the right to sue debtor states, without the requirement that the governments of the creditors should approve or appear in behalf of their citizens or subjects, and he cites for this, Article 2 of the convention of December 20, 1907, establishing the Central American Court.

The creation of a truly permanent international court has thus become a favorite subject with Dr. Wehberg, and he regards its establishment and successful operation as necessary to any enlightened system of international organization. To get the cases before the court, he advocates treaties of arbitration between the nations and, above all, to use a favorite expression of Baron Marschall von Bieberstein "a mondial treaty," which, however, shall not create such an extensive obligation as treaties between individual states. He regards a willingness to submit cases and a public opinion compelling their submission as infinitely more important than paper agreements, and in this connection he points out the defects in the recent proposed treaties between the United States, Great Britain and France, which have appeared to many observers, but which have, it would appear, not hitherto found expression. Thus, he says that the commission of inquiry proposed by these treaties would withdraw cases from arbitration, and the adjustment reached would be in the nature of a compromise by which "a development of international law would be wholly frustrated and the aim of international arbitration belittled." (*Die internationale Friedensbewegung*, p. 36.)

The discussion of arbitration to be found in the *Internationale Schiedsgerichtsbarkeit* and *Die internationale Friedensbewegung* is excellent, and he renders justice to the services of Latin-America in a way which has rarely hitherto been done. In a recent contribution to Niemeyer's *Zeitschrift für internationales Recht* for the year 1912 (pp. 317-325), Dr. Wehberg gives the clearest analysis yet published of the various treaties of arbitration concluded since the Hague Conferences. Mention should be made of his brochure regarding the claims of the Mannesmann brothers (1910) in order to show that his judgment of international affairs is free from national bias.

From what has been said, it is abundantly clear that a pacifism which excludes projects of a world-state, which bases itself upon the factors of international life, the development of industry and commerce upon an international basis, with a law for its regulation and protection, and a really permanent international court for the decision of controversies by judicial process, is a kind of pacifism to which reasonable men are becoming more and more inclined.

From this examination of Dr. Wehberg's various publications, the reader does not need to be informed that Dr. Wehberg approaches the Hague convention of 1907 for the pacific settlement of international disputes with both sympathy and knowledge. The text of this important convention dealing, as it does, with good offices, mediation, arbitration, the so-called permanent court, and arbitral procedure, is printed in French and German in parallel columns. A commentary is added to each article, and in this commentary every clause is discussed in the light of its origin, its nature and its history. The discussion is critical as well as expository. The proceedings of the Hague Conferences are cited, wherever in point, the views of the delegates are mentioned and subjected to examination, and the literature, whether in the form of books, pamphlets or addresses, German as well as foreign, is drawn upon. As examples of the elaborate care and painstaking industry, as well as balanced judgment, which Dr. Wehberg has brought to the elucidation of the convention, the reviewer would point to his commentary upon Article 2 dealing with good offices and mediation (pp. 10-12); Article 3, dealing with the same subjects (pp. 14-17); Article 37, dealing with arbitral justice (pp. 46-56); Article 45, dealing with the composition of the temporary tribunal (pp. 74-79); Article 53, dealing with the so-called compulsory *compromis* (pp. 98-103); Article 62, dealing with the functions of members of the court, agents and counsel (pp. 116-121);

and Article 83, dealing with the so-called revision of the arbitral award (pp. 144-150).

The book is but a pamphlet of 185 pages, including a serviceable index of matters as well as names, and was originally published as an appendix, to the *Archiv des öffentlichen Rechts* for 1911. In the reviewer's opinion, this "Commentary" is the most scientific, and at the same time the most useful, analysis of the convention for the pacific settlement of international disputes, which the late Mr. Holls aptly called the Magna Charta of international law.

The peace movement needs the services of partisans trained in international law, if it is to accomplish useful results and develop an international organization, which shall be consistent with international conditions as they have resulted from centuries of growth and development. It is a matter of congratulation that a man of Dr. Wehberg's attainments has given himself unreservedly to the cause.

JAMES BROWN SCOTT.

La Guerre et les Traités. By Robert Jacomet. Paris: H. Charles-Lavauzelle. pp. v, 188.

The production of such a book as this by an army officer who is at the same time a doctor of law should be a hopeful sign for those who are anxious to hasten the coming of peace. This book shows in logical manner how little truth there now is in the old maxim, "war puts an end to treaties."

The author recognizes his indebtedness to the course given by Professor Politis to whom he dedicates the book. The book is divided into two parts: I. War and the Treaties from 1648 to 1815; II. War and the Treaties from 1815 to the present time. The Introduction traces the early evolution from the *homo homini lupus* idea through the feudal and other stages showing the development of the recognition of rights consequent upon the extension of economic and other relations.

From 1648, rights which had before been maintained by a few states became generally admitted. Some of these rights, as in military occupation, were regarded as binding even if no treaty provision existed. The treaty provisions were generally bilateral till early in the eighteenth century. In this century the influence of the different doctrines as set forth by writers began to have decided weight. The prevailing opinion was that war put an end to a treaty except as clauses in the treaty provided for the existence of war. At the end of the wars in the seventeenth

and the eighteenth centuries renewals of treaties were commonly negotiated. Gradually rules to be specially operative in the case of war were introduced. Rights of the nature of servitudes were only temporarily suspended.

From 1815 the influence of the readjustment of political ideas which the Napoleonic era had forced upon Europe is evident in the doctrine in regard to treaties. Commerce in the modern sense and the newer systems of insurance make the incidence of loss from war less certain. The multiplication of international unions is an evidence of community of interests which mitigates against war. Yet in spite of the many reasons why war should not terminate all treaties there are some who still maintain the abstract doctrine that "war puts an end to all treaties." Most of these admit that there are exceptions. Others would maintain that "treaties subsist in spite of war."

The author also considers briefly the effect of recent wars upon treaties. He selects the Crimean War of 1856, the Franco-Prussian War of 1870, the Russo-Turkish War of 1878, the Chino-Japanese War of 1893, the Greco-Turkish War of 1897, the Spanish-American War of 1898, and the Russo-Japanese War of 1904.

Maintaining that instead of destroying treaties, war only modifies their operation, Dr. Jacomet says that the old doctrine that war puts an end to treaties should fall into oblivion with other errors which persist because they were held in the past. He, of course, admits that treaties of the nature of political alliances and economic agreements come to an end by reason of war. In the study which he has made Dr. Jacomet sees a proof of the ultimate triumph of law over force.

In the bibliography it is sometimes difficult to determine to what book reference is made because the edition is not mentioned. Such errors as the listing of David Dudley Field under "Dudley," the listing the works of Professor N. Ariga under "Nagao-Ariga" and the entry of Professor Moore as "Moore (J. Bassot)" are noticed.

GEO. G. WILSON.

La Question du Danube. By G. Demorgny. Preface by Louis Renault. Paris: Library of the Society of Recueil Sirey. 1911. Price 5 francs.

One of the characteristics of the beginning of the twentieth century is without doubt the organization of the Society of States, of which the different elements multiply: in Europe these are, besides the international

offices becoming from day to day more numerous, the Permanent Court of Arbitration and the International Prize Court; in America, besides the flourishing Pan-American Union, the young Central-American Union which has just been born. The moment appears then well chosen to study the most ancient of the organs of international administration, the European Commission of the Danube which, by the considerable services which it has rendered, deserves "the admiration and the gratitude of the civilized world" as the Crown Prince of Roumania declared when representing the King at the celebration of the fiftieth anniversary of its creation. Also the work that M. Demorgny has consecrated to it will be received as kindly in America as it has been in Europe.

This book is divided into two parts. In the first, after bringing into relief the considerable rôle played by the Danube in the communications between occidental and oriental Europe, the author outlines the political and diplomatic history of the basin of the great river, as it is indispensable to know the bordering states of the Danube, their interests and their aspirations in order to understand the policy of Europe regarding the rule to which she has subjected them.

The second part is more particularly devoted to the question of the navigation of the Danube and to the study of the legal form of government of this river. After a short outline of its status before 1856, M. Demorgny shows how the importance possessed by the mouth of this river for the maintenance of the political balance in the Orient determined the Powers to insert in the Treaty of Paris suitable rules in order to assure the liberty of the navigation of the Danube under the control of Europe and to expose the difficulties of political order, financial and material, that the European Commission of the Danube encountered in order to acquit itself of the task confided to it, the delicate situation of Roumania, a bordering power, with regard to the Commission, the actual regulating of the middle Danube, etc.

The most interesting chapters are those devoted to the organization of the European Commission itself, which the author, owing to the office he occupied, had the means of knowing well, to its personnel, its budget, to the works which it had undertaken and to the considerable improvements which it had brought to the navigation thereby becoming much safer and so easy that sea-going vessels of over 3,000 net register tons now come up to Galatz. These particulars were until now but little known and deserved to be published in order to show that, through good understanding between the Powers, they have been able to realize

a delicate and difficult work, which the bordering states could not have accomplished alone in such a short time and with such a continuity of views. If the judgments brought by the author on the policy of such or such of the bordering Powers of the Danube are susceptible of discussion, one can only subscribe without reserve to the justified eulogies that he bestows on the work of the Commission. An indisputable master of international law, M. Louis Renault, has kindly presented M. Demorgny's book with an authoritative preface: such patronage dispenses of all appreciation of the value of this work.

FRANCIS REY.

The Dutch Republic and the American Revolution. By Freidrich Edler, M. Dipl., Ph. D. (Johns Hopkins University Studies, Series xxix, No. 2.) Baltimore: Johns Hopkins Press. 1911. pp. vii, 252.

The American Revolution, interpreted in a narrow sense, was a struggle of the American colonies to preserve their national independence against the aggressions of British imperialism. In a broader use of the term, it was an international conflict, involving many of the states of western and northern Europe. Dr. Edler's monograph has for its purpose the elucidation of the important part played by the United Provinces of the Netherlands in the European struggle. The point of view is largely that of diplomacy, covering the interpretation of old, and the formation of new, treaties, the principles of international law respecting the rights of belligerents and neutrals on the high seas, and allied subjects. The author has very wisely interpreted his theme in the light of economic, naval, military and political forces and events, and very properly so, for the international issues were laid deep in the desire of competing European nationalities to preserve or develop commercial and colonial advantages, sea-power, and political integrity. But the study is more than an account of the relations of the Dutch Republic with Europe. Both directly and indirectly, it presents a much needed history of the relations between an established republic in Europe and one across the sea struggling for recognition.

The monograph opens with a concise and lucid statement of the forces which, at the outbreak of the revolution, tended to draw upon England the open hostility of the Bourbon rulers and the resentment of Prussia. In this situation, the lack of preparation for war and the protection of her extensive carrying trade dictated a policy of the strictest neutrality for the Dutch. It was a policy most difficult to consummate. Internally

the republic was torn by party dissensions and the people were divided in sympathy between England and her colonies. Abroad she was forced to steer a precarious course between the bitter enemies, England and France, the former claiming Dutch assistance by virtue of treaties of alliance, the latter seeking to hold the republic to a policy of neutrality as the most effective means to aid France and harm England. Three chapters are devoted to the relations between the Dutch and England, one showing the efforts of the republic to maintain its policy of neutrality in the face of great odds, another to the development of Dutch antagonism under the pressure of English aggression, and the third to armed conflict between the two countries on the accession of the Dutch to the league of Armed Neutrality of 1780. Two chapters are allotted to the relations between the republic and the United States, one covering the early relations, the other the development of closer relations consequent upon the outbreak of the Dutch war with England. The final chapter deals with the peace negotiations which culminated in the treaty of 1783. It is the opinion of the author that the Dutch Republic, which had shown herself the benefactors of the United States and France, in the gigantic conflict, "must be considered the real and only victim of the American Revolution." By the treaty of peace she suffered severely in the loss of territory and national honor, and party dissensions deepened to such an extent a few years later as to cause a revolution when England seized the occasion to interfere and force the republic into a more complete submission to her will.

The study is securely based upon documentary evidence. Very fortunately the author found his material close at hand, consisting chiefly of the Spark's collection of transcripts in the libraries of Harvard and Cornell universities, the Bancroft collection in the library of the New York Public Library, and the Steven's Dutch Papers in the Library of Congress. In this way the archives of Europe have been made readily accessible to the student in America. The author has also availed himself of collections of source material in print, such as Wharton's *Revolutionary Diplomatic Correspondence of the United States*, Beaufort, Brieven van der Capellen, and others. He has also depended to some extent upon Dutch historians, such as Colenbrander, Davies, Blok, and Nijhoff. It would have been of great service to students had the author given a critical bibliography of his material.

Dr. Edler has given us a clear and well written account, based upon sound historical scholarship, of a subject which well warrants the time

and space given to it. It is evident that a line has been omitted from the sentence at the top of page 33.

W. T. ROOT.

L'Expulsion des Étrangers. By Alexis Martini. Paris: Larose and Tenin. 1909. pp. xxv, 369.

In this work M. Martini deals fully with the subject, which, considering its importance not only as a branch of international law but as a topic for the careful consideration of legislative bodies in those countries which have perennially to cope with the question of the admission and exclusion of aliens, has not received from publicists and text-writers the attention which it merits. The author points out that under the French law of 1849, which regulates the expulsion of foreigners in France, expulsion is a police measure purely administrative and within the discretion of the state to exercise; that it is not to be confused with extradition, and must be clearly distinguished from banishment in that banishment is the result of conviction for a crime; that the causes for expulsion need not be assigned and that there is no ground for appeal to the courts. He quotes and refutes attacks against the existence of the power of expulsion in foreign states, expressing the view that as between the state and the alien admitted a contractual relation springs into being simultaneously with his lawful entrance into the country, whereby the state undertakes to protect the foreigner and the latter to merit that protection; and that acts performed by the foreigner which give rise to his expulsion constitute a violation of the mutual agreement entered into between him and the state which justifies the withdrawal of the protection hitherto extended by the latter. He asserts the principle so often enunciated by the Supreme Court of the United States that the right of expulsion is an inseparable element of national sovereignty, and points out that constitutional guarantees of liberty and security to person and property cannot be interpreted literally in their application to foreigners who subject themselves to expulsion.

In passing to the consideration of what persons are subject to expulsion under the law of 1849, which provides that it shall be within the power of the Minister of the Interior to order the expulsion of any alien traveling or residing in France, he points out that the birth of a child within French territory does not, as in the case of a child born in the United States, relieve him from the operation of the governmental right to exclude. Article 8 of the French Civil Code provides that children

born of foreigners in France may acquire French citizenship on the condition that at the time they reach their majority they are domiciled in France. It follows that during their minority they are subject to expulsion; a conclusion which has been definitely affirmed by the French courts. The nationality of such child is held to be that of the parents until majority is reached, and, as aliens, they are subject to the operation of the act. Nor are foreigners who have taken up their domicile in France — and by domicile is meant a permanent abode acquired by the formal application for the permission of the government to establish it as required by the laws of France — for that reason exempt from the operation of the law of 1849. The author points out, however, that persons who have obtained this permission and who have acted upon the privilege extended by the government are in a better position as regards their right to remain than strangers who have failed to do so. That this was the view taken by the legislator appears from the provision of law specially adopted for the exigency. It is therein provided that the order of expulsion issued against a foreigner who has acquired domiciliary rights in the manner provided by law shall be of no effect if within two months after its issuance the state has not revoked the permission granted to a foreigner to formally acquire his domicile in France. It is unnecessary to add that the citizens of France, with few exceptions, are not subject to the operation of the exclusion law.

In passing to the consideration of what constitute justifiable causes of expulsion, the writer points out that since it must be admitted that foreigners who have been convicted of an offense may well be deemed to be a menace to the public safety of the state, a single conviction constitutes a cause of expulsion of which the government may take cognizance and act accordingly.

Besides the demands of the peace and public security of the state, and as another general ground justifying the exercise of the right, is the existence of a grave political necessity based on political reasons. As examples of the right of expulsion exercised on this ground, the author cites or quotes in part many well-known cases of interest to the student of this branch of the law. As acknowledged justifiable causes of expulsion under this head he gives the publication of anarchistic views, the condonation of assassination, espionage, intrigues and plots against the state, a tendency to resist the laws of the state, anti-militarism, and insult offered to the national flag.

He denies, however, that international law recognizes that foreigners

may with justice be expelled from a country because the number of manual laborers exceeds the demands of capital.

Advocating, as the author does, the existence of the right of states to expel alien friends in time of peace, it follows that he refers with approval to the general view of publicists that international law recognizes equally the right of any state to cause the departure of enemy subjects from its limits in time of war. He points out that this is one of the natural results of the existence of war between two states, but that the declaration of war does not *ipso facto* bring about the expulsion *en masse* of enemy subjects; and that even in time of war it is the duty of the state to exercise this right with caution and to give all reasonable opportunity for relieving its territory with the least harm to themselves.

The expulsion of foreigners being by nature an administrative measure, it naturally devolves upon administrative officers to take necessary steps for putting it into effect, and the writer unqualifiedly takes the view that the issuance of an order of expulsion is not within the jurisdiction of judicial officers. Being a national police measure, it lies with the administration to direct its operation, and the courts have no right to direct the expulsion of a foreigner in addition to imposing upon him the penalty which the law prescribes for the crime of which he has been convicted.

The author goes into interesting and instructive detail regarding the procedure incident to the exercise of the right. As the first step, the preliminary investigation looking toward the expulsion of a given alien, corresponding to the investigation by the proper inspection officer under our immigration law on which to base the warrant of arrest issued by the Secretary of Commerce and Labor; and as the second, following the order of expulsion, corresponding to the deportation warrant known to our law, which with us, however, is the third instead of the second step in the proceedings, the latter being with us the issuance by the Secretary of the warrant of arrest, which is the basis of the administrative hearing. Under the law of France the final stage is the notification to the interested party that the order of expulsion has been issued. No necessity exists, of course, under our own law for such notification, in view of the fact that the party is himself entitled to a hearing, has full knowledge of the governmental action taken, and his deportation is the act of the government itself.

On the continent, on the other hand, the actual expulsion is not, as a rule, carried out by administrative officers, except on failure of the

alien to obey the behests of the executive officer who has issued the order. As M. Martini points out, the necessity of individual notification of collective expulsion does not exist in time of war.

As our courts have so often held, the detention of an alien pending his deportation cannot be considered imprisonment for crime, but simply as a legitimate means to be employed by government in insuring the departure from this country of foreigners who belonged to a class the members of which are, for public reasons sufficient to the state, not considered competent to remain. The right of administrative detention, although, even as the author points out, the object of severe criticism, is fully sustained in this work; but he does not hesitate to affirm that the power should not be abused.

The legal effects of the decree of expulsion have been considered at length by the author. They necessarily include, he says, a prohibition against the alien's return.

At this point it may not be inapt to draw attention to the distinction, which is made clear by an examination of M. Martini's work, existing between the exercise of the right of expulsion by the United States and the various European countries. In the latter jurisdiction conditions calling for the exercise of the right very generally arise with the commission by a foreigner of an act or acts which in greater or less degree threatens the welfare or security, or renders the presence of the offender undesirable for public reasons. In the United States, on the other hand, when a warrant is issued for the deportation of a foreigner, the cause for its issuance is very generally nothing more than the unlawful presence of the alien in the United States — a presence not unlawful on account of the commission of any act on his part threatening the public welfare, but because he is afflicted with some disability which constituted a bar to his lawful entry; or because, as under the Chinese Exclusion Acts, he belongs to a class the members of which cannot lawfully enter this country. Up to the passage of the Act of March 26, 1910, amending that of February 20, 1907, the Acts relating to the admission of aliens had not specifically prohibited the return of those who had been excluded or had been deported as being unlawfully here. It is obvious that where the only ground of deporting foreigners is the fact that they have entered unlawfully through the existence of some such disability at the time of entry, which may long since have ceased to exist, it does not include a prohibition against the return of the alien to this country when competent to enter in accordance with its law. But where, as in

the amended Act of 1910, deportation is ordered in the case of aliens found to have committed certain prohibited acts or to have become members of certain prohibited classes after having entered the United States, the warrant ordering their departure might, even in the absence of the special prohibition against their return contained in the act, be deemed to include such prohibition.

The author has devoted considerable space to the question of the right of the courts to pass upon the validity of administrative decrees of expulsion, a subject which has constantly claimed the attention of the courts of this country and concerning which, even after the rendering of the *Ju Toy* decision by the Supreme Court, judicial opinion is not unanimous.

The question of the admissibility, under our immigration law, of the wives and children of naturalized aliens, has always been an important feature in that branch of our jurisprudence, and of late the Federal courts have reached conflicting opinions on analogous states of fact. Similarly, the courts have differed as to the effect of a marriage entered into between a citizen of the United States and a woman of alien extraction, particularly where it was shown that in all likelihood the marriage, though legally performed, was entered into for the purpose of enabling the woman to enter this country.

Under the title of "Termination of the right of expulsion," M. Martini devotes considerable attention to similar questions arising in connection with the law of France dealing with the general question from the standpoint of expulsion rather than of exclusion. He maintains that the mere fact that a marriage has been contracted by a foreign woman, who has been expelled from France, with a French citizen for the sole purpose of enabling her to return to France, has and can have no effect on the political change of status which, under the French law of citizenship, must result from such a union. The naturalization of the parents brings about the naturalization of their minor children; but not so with children having reached their majority, who, the author shows, as may the wife of a naturalized citizen, obtain the citizenship status under certain conditions.

The book shows excellent preparation in the special branch of law which it covers, as well as an intimate knowledge of the subject-matter, and will undoubtedly prove of special interest to all students of international law and have a peculiar attraction for those who have had occasion to examine into the vexed questions which arise under our laws

regarding the admission and exclusion of aliens. It contains numerous quotations from the foreign laws on the subject, and in the appendix many of these laws are set out in full. While much space is necessarily devoted to the consideration of problems arising in connection with the French law of expulsion, it is nevertheless obvious that the intent of the author is to treat his subject from a comparative standpoint and to show that questions arising in connection with the rights and obligations of governments touching the expulsion of foreigners forms of itself an interesting and important branch of the law of nations. In this he has been successful.

CLEMENT L. BOUVÉ.

La Bulgarie. Etude d'histoire diplomatique et de Droit international.
By Auguste Chaunier. Paris. Rousseau. 1909. 224 pp.

The book of Mr. Auguste Chaunier is a good enough thesis for the doctorate, but nothing more. A search for the discovery of original thought or hitherto unpublished documents goes unrewarded. The book is the result of a skillful and conscientious labor of compilation and vulgarization. The author divides his work into two parts, the first is historical, the other juridical. As for the first we have nothing to criticize. The excellent opusculé of Mr. Bausquet, *Histoire du Peuple Bulgare* (imp. Chaix, 1909), furnishes reading, attractive and instructive, of a different quality. Mr. A. C. lays greater emphasis, and rightly so, upon contemporary history, upon the reconstruction of the Greater Bulgaria and the reign of King Ferdinand. But even in this historical part, the author is prejudiced from the juridical point of view. He declares that the Bulgarian state was a sovereign state even before its independence, which is a debatable question; he views the annexation of Rumelia as constituting at first a real, and afterward a personal union, which is incorrect.¹

These different points are, of course, taken up again in the second part and developed in the form of a juridical dissertation. In doing so, the author merely reproduces the theories put forth before his advent, particularly in the good thesis of Mr. Sariivanoff *La Bulgarie est elle un Etat mi-souverain*, which he does not mention, and in the book by Serkis *La Roumélie Orientale*, which he does not seem to have consulted.

¹See our article upon this question in the JOURNAL, Vol. 5, p. 144 at pp. 151 and 169.

Chapter III, which deals with the realization of independence, is especially weak and contains errors.

Lastly, in the final Title II, which in special reference to the violations of the Treaty of Berlin develops into a dissertation regarding the obligatory force of treaties in general, the author proves sufficient scholarship but little informed as to the most recent doctrines. His adherence to the principle of nationalities and his critique of the theory of the balance of power, at present the only possible guaranty for maintaining peace, are possibly the result of the enthusiasm of a generous, but certainly of a somewhat unsophisticated and romantic nature.

GEORGES SCELLE.

Principles of the Constitutional Law of the United States. By Westel W. Willoughby. New York: Baker, Voorhis & Company. 1912. pp. 576.

The original treatise in two volumes, of which the present single volume is an abridgment, was reviewed in the JOURNAL for October, 1911. To those who are familiar with the merits of the larger work, little need be said in commendation of the decision of the author to issue an edition adapted to the use of undergraduate students. In the larger work the difficult questions of constitutional law were discussed at length and the more important decisions of the Supreme Court were commented upon in detail; in the abridged edition this discussion and comment has been necessarily reduced in amount, but the process of reduction has been one of condensation rather than of elimination. No complicated subject is passed over without attention being called to the fact that a difficulty exists, so that the instructor of a class can, when the circumstances justify, require of the student a closer investigation of the question. The author, in fact, points out in his preface that it has been his effort "to suggest, and in a measure to discuss, the unsettled questions of our Federal jurisprudence."

The abridged edition has thus lost nothing of the peculiar merit of the original. The point of approach is in each case the same, and it is the characteristic method of treating the subject which distinguishes both editions from other commentaries on international law. Professor Willoughby's point of approach is that of the political scientist. He is concerned with determining not only what his authentic interpretation of the Constitution is at the present day, but also what are the fundamental principles upon which the interpretation of the Constitution

has in each case been based; and in so doing he exhibits the growth of judicial opinion on a given question and suggests the probable trend of future decisions on points of law not altogether settled.

It is to be noted that in his arrangement of the subjects covered by the Constitution the author departs from the traditional method of following the Constitution clause by clause. This enables him to group together correlated clauses of the Constitution, and to present a unified treatment of principles which have been developed from several distinct clauses of the Constitution. Moreover, in thus departing from the text of the Constitution in favor of a more logical arrangement of subjects, the author is enabled to discuss in their proper place those principles of constitutional law which are not expressly stated in the Constitution, but which have been developed from other principles expressly stated or from the construction of the Constitution as a whole. The treatment of the doctrine of Federal Supremacy in the larger work was carried out in masterly style, and was in itself a distinct contribution to the literature of constitutional law; it is unfortunate that in the abridged edition the discussion of this important subject had to be in any way curtailed.

Professor Willoughby is at his best when engaged in discussing and determining the fundamental principles of constitutional construction and the processes of reasoning by which the Supreme Court has come to its decision in questions involving the statement of a new doctrine or the extension of an old one. As a political scientist he makes it his object to investigate cause and effect in the principles of the law and to discover the hidden forces at work in the development of the law. On such subjects as Federal Supremacy, Interstate Commerce, Federal Powers of Taxation, the Obligation of Contracts, in the abridged as well as in the larger work, the author follows step by step the historical progress of judicial decisions, marking the advance which each succeeding decision made upon the law as previously interpreted, and weighing carefully the force to be given to the latest decision upon the question.

It is this scientific spirit in which Professor Willoughby approaches his subject and the careful criticism to which he subjects the decisions of the Supreme Court, which has enabled him to produce a work marked at once by originality and depth of insight. Under his method of treatment the Constitution appears as a living and growing instrument of government; its historical past is set forth to the extent necessary to throw light upon its present interpretation, while its future interpretation is rendered possible of prediction in the light of the principles upon

which existing decisions have been based. While it is, of course, not to be expected that the present compendious volume could afford space for the extended and critical discussion of questions which marks the larger treatise, its value for class room use, apart from its intrinsic merit, is largely enhanced by the fact that it follows the lines of the complete work, to which reference can at any point be made by the instructor.

CHARLES G. FENWICK.

Une clause des traités de 1814 et de 1839 "Anvers, Port de Commerce."
By Ernest Nys. Bruxelles: M. Weissenbruch. 1911. pp. 42.

La Neutralité sur l'Escaut. By Jonkhr. J. C. C. den Beer Portugael.
La Haye: Martinus Nijhoff. 1911. pp. 74.

These are two of the latest contributions of a polemic nature to the controversy which is just now agitating the minds of the publicists of Holland and Belgium concerning the international status of Antwerp and the neutrality of the Scheldt.² The question is by no means a new one, but its importance does not seem to have been fully realized until more recent years, and it is not difficult to detect that the growing fear of a possible conflict between Great Britain and Germany is the underlying cause of this sudden interest. The difference of opinion is due largely to conflicting interpretations of two treaties: the Treaty of Paris of May 30, 1814, Article 15 of which provides that "Dorénavant le port d'Anvers sera uniquement un port de commerce," and the Treaty of London of April 19, 1839, which reaffirms this provision in similar language: "Le port d'Anvers, conformément aux stipulations du traité de Paris du 30 mai 1814, continuera d'être uniquement un port de commerce." (Art. 14)

In order to appreciate more fully the exact situation it might perhaps be well to recall briefly the geographical position of the localities under discussion. The city of Antwerp is situated on the right bank of the river Scheldt, some 30 kilometers from its mouth. A short distance below Antwerp, in front of the island Beveland, the river divides into two channels, respectively north and south of the island, and enters Dutch territory (Province of Zeeland). The southern arm, which is usually known as the West Scheldt or Hont (Escaut occidental) reaches the sea at

² See also Ernest Nys, *L'Escaut en temps de guerre*, Bruxelles, 1910; and den Beer Portugael, *L'Escaut et la neutralité permanente de la Belgique, d'après les traités de 1839 et 1907*. La Haye, 1910.

Flushing (Kissingen), and is the more important of the two for ocean commerce. In 1839, when Holland finally recognized the independence of Belgium, she continued to levy toll on all shipping passing through the 23 kilometers of the Scheldt which lie in Dutch territory, until 1863 when she sold that right, and the river was opened to the trade of the world. To-day Antwerp is not only one of the greatest commercial ports of the world, but also one of the strongest fortresses of Europe. It is asserted on good authority that when all the projected forts and batteries are completed it will be practically impregnable, at least so long as its communications by sea are preserved intact.

No little excitement was therefore caused when, a few years ago, rumors spread that the German Emperor, in an alleged letter to Queen Wilhelmina — which, it may be safely asserted, never existed — had advocated the erection by Holland of a modern fort at Flushing! And when the Netherlands Government, acting upon the recommendations of a commission — appointed long before the Kaiser's letter is said to have been written — seriously considered the projects of fortifying Flushing and various other places, this action was at once interpreted as being aimed at England to further the sinister designs of Germany, and a storm of indignation broke out in the Belgian, French, and British press. Paraphrasing the well-known words of Napoleon I: "Anvers est un pistolet braqué sur le cœur de l'Angleterre," the London *Times* (December 21, 1910) referred to the proposed fortress at Flushing as "A pistol aimed at England, and a slap in the face of Belgium"; and a member of the French Chamber of Deputies exclaimed (January 16, 1911): "J'estime que le fait de fortifier Flessingue constitue une violation de la neutralité de la Belgique."

Now it will be remembered that the permanent neutrality of Belgium was guaranteed by the Powers in 1839 and was recognized by the Netherlands in her treaty with Belgium of the same year. This obviously imposed upon the Netherlands Government the obligation to prohibit the use of the river Scheldt for any warlike operations. This is not denied by the Belgian writers, led by M. Nys, but they insist that such prohibition should apply only to vessels of Powers intending to *attack* Belgium, and not to those whose purpose it is to *protect* it and preserve its neutrality.³ It is further asserted that by the treaty of 1839 between

³ Cf. also Baron Descamps, *Le droit de guerre et le droit d'alliance dans la constitution internationale de la Belgique*, Bruxelles, 1901. And his *La Neutralité de la Belgique*, 1902.

Belgium and Holland, the two countries agreed to exercise divided sovereignty over the Scheldt, as it provided for their joint supervision over pilotage, fisheries, maintenance of channels for navigation, etc., and that consequently Holland could not claim exclusive jurisdiction over that portion of the river.⁴ Moreover, the liberty of navigation on international rivers, as determined by the Congress of Vienna and the Treaty of Paris (1856), should apply to men-of-war as well as to merchant vessels. As regards the port of Antwerp itself, it is essential as a basis of operation for the fleet or army of any Power called upon to safeguard Belgian neutrality. Such temporary use of the port for military purposes would not constitute a violation of the provisions in the treaties of 1814 and 1839. In fact, Antwerp never existed as a purely commercial port, but had always been well fortified, and its right to such fortifications had never been disputed.

M. den Beer Portugael defends the opposite side. He denies that a fort at Flushing would be aimed at Great Britain⁵ or any other single Power. But he believes that the Netherlands Government, as a neutral party, has not only the right, but according to the laws of neutrality as laid down by the Second Hague Conference, also the duty to prevent the use of the Scheldt by any Power, whether attacking or protecting Belgium. In doing so it is not interfering with the execution of the guarantees of Belgian neutrality assumed by the Powers, inasmuch as there are other approaches to Belgium than through Dutch territory. The latter, over which Holland exercises complete and undivided sovereignty — the joint supervision with Belgium as to navigation, fishing, etc., being of a purely economic nature — must be respected as neutral by the Powers; and to safeguard its inviolability the Netherlands Government is fully justified in erecting forts at Flushing and elsewhere in that region. The freedom of navigation on international rivers refers exclusively to merchant vessels, and can never be invoked in favor of war vessels. That Antwerp has a perfect right to erect as many forts

⁴ Cf. in this connection the contention of the United States in the North Atlantic Fisheries Arbitration with regard to "Question One" submitted to the Tribunal and decided in favor of Great Britain.

⁵ "Si l'on pouvait lire dans le cœur des Néerlandais, on y verrait la vive sympathie que la grande majorité d'entre eux a pour les Anglais. * * * Ceux-ci vous ressemblent beaucoup en manières, en coutumes, en caractère; peuples navigateurs tous les deux depuis des siècles, vivant près de la même mer, nous nous comprenons," p. 3. This fact is frequently lost sight of by writers discussing the probability of the annexation of Holland by Germany.

as it deems necessary for its defense is not denied, but it can never become, even temporarily, a naval base, whether of Belgian or foreign vessels, without a violation of the treaties of 1814 and 1839. For it is there expressly provided that Antwerp should be exclusively (*unique-ment*) a commercial port. It is unfortunate that the value of the vast fortifications around Antwerp is thereby considerably lessened, but the Belgian Government should have taken that factor into consideration before undertaking the works. A neutralization of the Scheldt might, of course, solve the difficulty, and the author suggests, in concluding, that the advisability of completely neutralizing all rivers separating or traversing different states be recommended to the Third Hague Conference.

The two books, especially that of M. den Beer Portugael, will do much to clear up the situation, although they should be read in connection with the articles and speeches to which constant reference is made, and which are necessary for a proper appreciation of the arguments used. They will not, however, assist one in understanding M. Nys' frequent excursions into purely military history whose bearing on the issue seems often extremely doubtful.

A. VAN HEMERT ENGERT.

International Arbitration and Procedure. By Robert C. Morris, D. C. L. New Haven: Yale University Press. 1911. x, 178 pp.; appendix 48 pp.; and index.

This little volume, with its brief foreword by the President of the United States, presents compactly and in a pleasant style the history of arbitration in general, followed by a description of the more important arbitrations to which the United States has been a party; discusses the grounds of international controversies and procedure before special commissions; and finally takes up the work of the Hague Conferences and the questions arbitrated before the various tribunals organized in accordance with the conventions adopted at those conferences.

In dealing with particular arbitrations, the author devotes most space to arbitrations between the United States and Great Britain, stating that he selects these "because of their greater importance, both to history and to the general subject," referring especially to the "greater relative importance of the questions which the United States Government has submitted to arbitration" when compared with recent arbi-

trations between other countries. He notices particularly the claims commissions under the Jay treaty; the various disputes over the Canadian boundary, including the Alaskan boundary difficulty; the joint claims commission of 1853; the recent treaty for the settlement of all pecuniary claims between Great Britain and the United States; the four arbitrations under the treaty of Washington; the fur seal arbitration; and the northeastern fishery dispute.

In regard to that class of international controversies involving "acute difficulties which deeply concern national interests, independence or honor" the author states, — obviously referring to the recent treaties between the United States and Great Britain and France, probably signed but a short time before his book was published, — "In defining the scope of arbitration, writers on international law have customarily excluded * * * the questions involving 'vital interests and national honor.' If I had been writing these lines a year or two ago, I should have said that those questions had no place in a historical review of the subject," adding — what he might have erased had the book waited until 1912, — "the events of the last few months, however, seem to indicate that this attitude may not entirely have been devoid of superstition," and, in a later passage, even foreboding the possibility of such erasure when he says, "There are indications that the Senate may repeat its performance of 1897, and again deprive the American people of a great opportunity. Calamitous as such action would be, it would only stay for a brief time the progress of this great idea."

The words of the Right Honorable Robert L. Borden, Premier of Canada, at the last annual banquet of the American Society of International Law, when, referring to the boundary line stretching three or four thousand miles across this continent, the peaceful determination of which has been marked by arbitration after arbitration, he expressed the wish that its existence might be rendered doubly sure by formal agreement between the British Government and that of the United States, accord with the views of Mr. Morris, who, in asserting that "our whole national history furnishes abundant evidence that the disputes usually prohibited — independence, honor and vital interests — have repeatedly formed the subjects of arbitration," says of this boundary line, "Both nations have not had the slightest difficulty in showing clearly that their 'vital interests' were involved in every case," yet "nearly the whole of the line has been drawn by arbitral tribunals. It forms not only, as already said, an impressive monument to arbitration, but also disposes

of the superstition that questions involving 'vital interests' cannot be settled by peaceable means."

In his paragraphs on procedure Mr. Morris most particularly describes the procedure with which he is doubtless most familiar from personal experience, — that of the claims commission, — but in his appendix, in addition to the rules of the commission appointed under the convention of 1857 between the United States and New Granada, the circular order of the Department of State for the guidance of claimants, March 5, 1906, and rules of the commission appointed under the protocol of 1903 between the United States and Venezuela, he prints the rules of the Permanent Court of Arbitration as set forth in the Hague Convention of October 18, 1907. Although his discussion of procedure is so brief and restricted, he mentions one point which practice before other arbitral tribunals than special commissions has shown to be equally vital in the presentation of cases there, and that is the necessity of "care and exactness" in drawing up the *compromis*, or agreement for submission to arbitration. He might well have referred to the *compromis* in the late Northeastern Fisheries Arbitration as an example of a carefully drawn agreement.

In the discussion of the Hague Conferences, Mr. Morris' text is purely historical, covering facts generally well known to the readers of this JOURNAL. However, in referring to the new prize court and endeavoring to defend it against the charge that it is "a court without law," Mr. Morris unaccountably overlooks the work of the London Conference, 1908-1909 (which was ratified by the United States Senate on April 24, 1912), establishing by unanimous consent of the nations represented a code for the express purpose of furnishing the international prize court with a law to guide it.

In summarizing the nine cases which have been heard before tribunals under the provisions of the Hague conventions of 1899 and 1907 Mr. Morris deals briefly with the procedure before each, the language or languages used, nomenclature of the pleadings, and constitution of the delegations representing litigant countries. The two most recent cases before the Hague Court, to which the United States was a party, are briefly but appreciatively discussed, the North Atlantic Coast Fisheries Arbitration being referred to as "perhaps the most important arbitration yet held at The Hague under the Hague conventions," the award in which is a "testimonial of incalculable value to the efficacy of arbitral settlements" because it "may be regarded as equally gratifying to both

parties to the controversy;" and the decision in the Orinoco Steamship Company's claim against Venezuela being considered "most important in that it recognizes that exceeding of powers and essential error may be grounds for holding void an international award. It is believed that this award will be regarded as a step of prime importance in making arbitration a judicial rather than a diplomatic or compromise proceeding."

To one interested in arbitration and little acquainted with its history, principal cases, or theories, but desirous of a brief, generally accurate and readable summary thereof, Mr. Morris's book will furnish a pleasant hour or two of profitable reading. The reviewer, however, will confess to a little disappointment at finding that an author of Mr. Morris' international experience and reputation has not seen fit to give a somewhat more scientific and suggestive discussion of arbitral procedure, — a field scarcely entered by careful and competent authors. Possibly he considered it beyond the scope of this work, and if so, the reviewer feels that he expresses the desire of the readers of the JOURNAL in hoping that Mr. Morris will supplement his present work.

W. C. C.

War and the Private Citizen—Studies in International Law. By A. Pearce Higgins, M. A., LL. D., with *Introductory Note* by the Right Honorable Arthur Cohen, K. C. London: P. S. King & Son. 1912. xvi, pp. 200.

The introduction to these valuable and interesting studies by the learned author of an interesting and exceedingly valuable work on the Hague Peace Conferences, is furnished by the Right Honorable Arthur Cohen, K. C., a well-known and a distinguished practitioner, and is at once an analysis of the volume and a commendation of its views and method of execution. It may be said, however, without in any way questioning Mr. Cohen's authority, that Dr. Higgins needs no introduction to students of international law, that his works speak for themselves, and that, judged solely by their merits, he has a distinct and individual claim to a respectful hearing by all serious-minded students of international law.

In one sense of the word the present volume may be considered as a contribution to the peace movement, because the learned author endeavors and successfully "to show the great possibilities of harm which war may occasion to the civilian population." He says, and truly, that "the wider the diffusion of the knowledge of international law, and par-

ticularly of that branch of it which relates to war, the greater is the hope for the maintenance of peace." In the next few sentences of the author's preface, his views on the subject are so clearly expressed as to justify quotation. "That this extended knowledge of the laws of war," he says, "or the propaganda of the formula that it is impossible for one civilized nation to gain economically by the conquest of another will put an end to war I do not think probable. They may, however, assist in moments of tension in steadying popular feeling, and aid in producing a calmer outlook; but, as I have pointed out, war remains possible so long as the motives for war remain, its causes are elemental and defencelessness and attack are in this connexion frequently correlative terms. 'So long as current political philosophy in Europe remains what it is,' says the author of *The Great Illusion*, 'I would not urge the reduction of our war budget by a single sovereign'" (pp. xiv-xv).

The author's viewpoint is further expressed in various passages in the first chapter, which was delivered as an inaugural lecture at the London School of Economics and Political Science for the session 1911-1912. "Certainly we should do," he says, "all that in us lies to seek peace and ensure it, to encourage all the factors that produce peace, especially the growth of international confidence and respect for the aspirations and motives of other nations. Ignorance and want of insight may produce catastrophes, the extent of which no one can foresee. War is a catastrophe, an evil of great magnitude, how great, perhaps we, who have so long enjoyed freedom from invasion, can hardly understand. Not all wars in the past have been wrong, and as long as violence, injustice, ambition, greed, bad faith and selfishness remain in human nature, so long is war unlikely to be removed permanently from the forces which make for the development of the world" (pp. 7-8).

Dr. Higgins believes in "war in order to preserve * * * legitimate self-respect and dignity." It is, however, gratifying to note that he considers arbitration "extremely valuable as a method for solving the majority of international disputes" (p. 9). He evidently looks upon the preservation of the balance of power in Europe as essential and considers that "the maintenance of respect for international law can sometimes only be accomplished by more forcible means" (p. 9). These extracts furnish, it is believed, the point of view from which the present volume has been prepared.

In the first chapter, entitled "The Laws of War," Dr. Higgins insists that, while war is a relation between state and state, its effects are not

and can not be confined to the state and the actual combatants, that the non-combatants are affected in their business and personal relations, and that they do, and, as a matter of fact, must share, along with the state, the consequences of war. He illustrates these views, which the present reviewer considers sound and unanswerable, by the hypothetical case of an invasion of Great Britain, and shows by concrete examples the consequences of war, not only to the state and actual combatants, but to the peaceful elements of the population, and he concludes this treatment of the subject by a justification of the capture of private property of the enemy upon sea. He insists upon a careful and thorough examination of the advantages and disadvantages of immunity from capture of the enemy's property on the sea and expresses the hope that Great Britain "will take no narrow and incomplete view of a highly complicated matter and that we shall be saved from many of the rash assertions and deceptive half-truths which have characterized some of the recent discussion of questions of international law." In Dr. Higgins' view, the immunity is apparently a half-truth, but its partisans may gratefully accept the half-truth, which Dr. Higgins allows them, until the whole truth is theirs by the practice of nations.

The second chapter, entitled "Hospital Ships and the Carriage of Passengers and Crews of Destroyed Prizes," is an interesting and valuable contribution. The solution proposed in the third chapter on "Newspaper Correspondents in Naval Warfare," which is also the conclusion of the United States Naval War College, seems convincing and acceptable. Thus:

Newspaper correspondents would thus fall under two classes: (1) those actually on board one of the belligerents' ships of war, for whom regulations might be made on a plan similar to those issued by the Japanese Government in 1904, and (2) those on board ships specially chartered and attached to one of the belligerents' squadrons. The latter would receive a certificate similar to that issued to correspondents attached to land forces evidencing their profession; the acceptance of this permission would involve an undertaking to comply with any regulations issued by the commanding officer of the fleet. A censor would be placed on board, without whose permission no despatches could be transmitted. Violation of any regulations would involve the withdrawal of the permission, and if necessary the removal of the offender from his ship, and the retention of it until the termination of war, or even its confiscation, according to circumstances. Press boats would, like hospital ships, undertake not to hamper in any way the movements of the combatants, and any orders issued by the commander of the fleet in regard to their movements should be entered on the ship's books. Regulations of such a character would have the effect of placing the transmission of news from the seat of war under the control of the belligerent com-

manders themselves. The legitimate desire of the world at large to know what was happening would be satisfied, only partially, it is true, but "military necessities," which play so large a part in all departments of the laws of war, may well justify a commander in assuming to judge of how much information may safely be communicated to the general public. It might thus be necessary, under some circumstances, completely to exclude from certain areas newspaper correspondents altogether (pp. 108-110).

The next chapter, entitled "The Conversion of Merchant-Ships into Warships," is a careful, adequate and, in the reviewer's opinion, impartial consideration of this very important subject, whose solution baffled the Second Hague Peace Conference and the experts who dealt with the subject at the London Naval Conference in 1908-1909. In the concluding chapter, "The Opening by Belligerents to Neutrals of Closed Trade," Dr. Higgins shows himself a convinced partisan of English practice, that neutrals should not enjoy in time of war the advantages of trade closed to them in time of peace. The reasons which justify British practice and which suggest that it become a rule of international law, are thus stated:

Every assistance given to a belligerent by neutral merchant ships tends to the lengthening of war, the increased suffering of the combatants and the civilian population and the greater dislocation of the trade of the world. It is surely in accordance with the general principles of justice and equity, and a logical deduction from admitted principles of the duties of neutrals that the Rule of 1756 should be adopted as a generally accepted international legal doctrine (p. 192).

The book as a whole is a careful and thoughtful piece of work, calculated to maintain the favorable impression which Dr. Higgins' admirable work on the Hague Peace Conferences created.

There is, perhaps, a small matter, which may be noted in conclusion. The title of the book leads one to expect a more elaborate treatment of the question of war as it affects private citizens. That is to say, that the work should discuss the peace movement, even though it be not a contribution to international peace. The title is in so far misleading, but the preparation and publication of the book is, it would seem, a recognition of the importance which the movement has acquired and the influence which it exercises.

JAMES BROWN SCOTT.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

[For table of abbreviations used, see Chronicle of International Events, p. 734.]

- Academy of International Law.* Die internationale Völkerrechts-akademie im Haag. *Alfred Nippold.* Deutsche R., 37:195. May.
- Aeronautics.* Notre flotte aérienne. *Com. Paul Renard.* R. pol. et parl., 72:5. April.
- . Luftspiegelung der Landkarte, Die. *Norman Angell.* Friedens-Warte, 14:88. March.
- . Sovereignty of the air. *Edinb. R.*, 215:141. Jan.
- Adriatic.* Österreichische Adriaforschung. *J. von Wiesner.* Öster. Runds, 31:107. April.
- Alexander II.* Alexandre II et la paix de 1875. *Baron Bonnal de Ganges.* R. du monde, 190:111. April.
- Algeria.* Colonisation officielle en Algerie, La. *Raymond-Aynard.* Le Corresp., 84:323. April.
- Arbitration.* Amerikanischen Schiedsverträge, Die. *Theodore E. Burton.* Friedens-Warte, 14:124. April.
- . Anglo-American arbitration. *Herbert W. Horwill.* Contemp. 101:475. April.
- . Arbitration compromise. *Nation (N. Y.)*, 94:50. Jan.
- . Arbitration treaties as they stand. *Chaut.*, 66:292. May.
- . Changing the arbitration treaties. *Cur. Lit.*, 52:375. April.
- . Defeat of the treaties. *Nation (N. Y.)*, 94:252. March.
- . Fortschritt in den amerikanischen Schiedsverträgen, Der. *Alfred H. Fried.* Friedens-Warte, 14:121. April.
- . International arbitration and international finance. *A. D. Noyes.* J. Pol. econ., 20:254. March.
- . Justice and arbitration. *Outlook*, 100:570. March.
- . Latest step in arbitration. *Theodore E. Burton.* Ind., 72:441. Feb.
- . Liste des cas soumis à arbitrage par une convention formelle et dans lesquels ont été parties des états américains depuis 1794 jusqu'en 1910. [Colombia. Bol. del. min. de rel. ex., 2:786] *R. gén. de dr. int. pub.*, 19:251. March-April.
- . Senate amendments to the arbitration treaties, The. *Augustus O. Bacon.* N. Amer. R., 195:673. May.
- . Significance of the arbitration treaties. *R. G. Usher.* Atlantic, 109:447. April.
- . Traités généraux d'arbitrage des Etats-Unis avec la France et l'Angleterre, Les. *Georges Scelle.* Q. Dip., 32:393. April.
- Armaments.* Limitation des armements, La. *Baron d'Estournelles de Constant.* La Revue, 23:1. March.

- . Limitation des charges navales et militaires. *Baron d'Estournelles de Constant*. R. de dr. int. et de légis. comp., 14:51.
- . Naval and military aviation. *G. C. Gray*. Eng. R., 11:99. April.
- . Notre défense nationale. * * * R. gen., 48:641. May.
- . Neuen Wehrvorlagen in Deutschland, Die. *Richard Gädke*. Friedens-Warte, 14:126. April.
- . Problem of armaments, The. *Francis T. Hirst*. Contemp. R., 101:317. March.
- . Rüstungsfrage im Wandel der Zeiten, Die. *Hans Wegberg*. Friedens-Warte, 14:89. March.
- . Wandlung vom Wehrzum Lehrideal, Die. *Rudolf Walter Kraus*. Friedens-Warte, 14:139.
- . Wehrvorlage im Reichstag, Die. *Alfred H. Fried*. Friedens-Warte, 14:161. May.
- . Wehrvorlagen, Die. *O. Umfrid*. Völker-Friede, 13:41. May.
- Australia*. Australie et ses relations commerciales avec la France, L'. *Pierre Ma. Q. Dip.*, 32:455. April.
- Balance of power*. Balance of power. *J. R. Scott*. Lippinc., 89:823. June.
- Bassermann*. Bassermann, the most genial of Germany's political leaders. *Cur. Lit.*, 52:404. April.
- Belgium*. Trois ans de colonisation belge au Kalanga. *Ferdinand Goffart*. R. gén., 48:761. March.
- Bismarck*. Bismarckerinnerung. *Eugen v. Tagemann*. Deutsche R., 37:275. June.
- Canada*. Canada and the navy. *Albert R. Carman*. 19th Cent., 71:821. May.
- . Canadiens du Maine, Les. *J. L. K. Laflamme*. R. Franco-Américaine, 91:79. May.
- . Question du Maine, La. XX. R. Franco-Américaine, 9:63. May.
- . Real Canada, The. *Norman Murray*. Chambers' J., 2:305. May.
- Canals*. Intercoastal canal, The. *Leon Locke*. National M., 35:867. March.
- Cerruti Arbitration*. Affaire Cerruti. Colombie et Italie. Sentence arbitrale du 6 Juillet, 1911. *Francis Hagerup*. R. gén. de dr. int. pub., 19:268. March-April.
- China*. Can the Chinese Republic endure? *Adachi Kinnosuke*. N. Amer. R., 195:451. April.
- . China's next step. *Dr. Sun Yat Sen*. Ind., 72:1315. June.
- . Chinese situation. *Cur. Lit.*, 52:394, 513. April, May.
- . La constitution provisoire. *La R. Jaune*, 2:152. April.
- . Manchus, The. *E. H. Parker*. Contemp. 101:529. April.
- . Neue China unter den Nationen, Das. *Paul S. Reinsch*. Friedens-Warte, 14:86. March.
- . New China and the re-grouping of the powers. *E. J. Dillon*, Contemp. 101:714. May.
- . Physcologie der chinesischen Revolutionen, Die. *Von Dr. Wilhelm eingeleitet von Dr. Paul Rohrbach*. Öster. Runds., 31:267. March.
- . Revolution dans les provinces, La. *Revue Jaune*, 2:162. April.
- . Russo-Chinese relations. *Edinb. Q.*, 215:190. July.
- . Situation, La. Les emprunts. *Revue Jaune*, 2:147. April.

- . Situation en Chine, La. *Henri Cordier*. R. bleue, 50:485. April.
- . Zur Gesichte der Chinesischen Revolutionen. *M. von Brandt*. Deutsche Runds., 38:371. June.
- . Yellow peril, The. *J. O. P. Bland*. 19th Cent., 71:1017. May.
- Congo*. Convention franco-belge du 8 Juillet, 1899. *Henri de Cock*. R. de dr. int. et de légis. comp., 14:24.
- Colonies*. Politique extérieure et intérêts coloniaux. A propos du Libérie. *Camille Fidel*. Quest. col. et mar., 36:19, 42. Feb.
- Contraband of War*. Naval case for ratifying the Declaration of London. *R. Custance*. 19th Cent., 71:438. March.
- Conventions*. Announcements of conventions, celebrations and expositions, 1912. R. of R., 45:596. May.
- Denmark*. Danemark og England i 1848. *W. R. Priot*. Gads Danske M., April, p. 451.
- Dardanelles, The*. Demestrazione ai Dardanelli, La. *Rass. Naz.*, 185:295. June.
- . Fortifications des Dardanelles, Les. *Jacques Dorobantz*. Q. Dip., 32:612. May.
- . New phase of the war. Closure of the Dardanelles. *E. J. Dillon*. Contemp. 101:876. June.
- . Österreich und die Wasserstrazen. *Alfred Birk*. Öster. Runds., 31:93. April.
- . Österreich-Ungarn und die Meerengenfrage. *Heinrich Grafen Lützow*. Öster. Runds., 31:83. April.
- . M. Tsarykoff and the latest phase of the Straits Question. *E. J. Dillon*. Contemp. 101:122. Jan.
- . Zur Dardanellen frage. *Dr. Linde*. Die Granzboten, 71:413. May.
- Debts*. Emprunts d'États contractés chez les neutres au profit des belligérants, Des. *Clunet*, 39:814.
- Eastern Question*. Situation in Albania and Macedonia. *H. Charles Woods*. Fort., 91 (97):912. May.
- Europe*. Zweckerband Europa. Friedens-Warte, 14:81. March.
- Expansion*. Policy of territorial expansion, The. *Oriental R.*, 2:399. May.
- Exterritoriality*. Zur Lehre von der Gebietshoheit und der Exterritorialität. *Ernst Radnitzky*. Archiv des öffentl. Recht., 28:454.
- Extradition*. Cas intéressants d'extradition dans l'Empire Britannique en 1909, 1910, et 1911. *P. Radcliff*. *Clunet*, 39:728.
- . Nouvelle loi russe sur l'extradition, La. *Léon Devogel*. R. de dr. int. et de légis. comp., 14:187.
- Far East*. Education in the Far East. *Henry M. MacCracken*. *Oriental R.*, 2:476. June.
- Fisheries*. Phoques a fourrure, Les. *Victor Revillon*. R. de Paris, 19:99. May.
- Foreign Associations*. Droits des sociétés étrangères. *Albéric Rolin*. R. de dr. int. et de légis. comp., 14:82.
- Foreign Judgments*. Sur un projet de traité Franco-Allemand pour l'exécution réciproque des jugements. *Fernand Jacq.* R. pol. et parl., 72:379. May.
- France*. France of to-day. *Gustave Lanson*. N. Amer. R., 195:456. April.
- . French crisis; its origin, The. *E. J. Dillon*. Contemp., 101:261. Feb.

- . Opinion française et la politique russe. *Commandant de Thomasson*. Q. Dip. 32:449. April.
- . Russland, Frankreich und Deutschland. *Wilhelm v. Massom*. Die Grenzboten, 71:97. April.
- . Truth about the Franco-German crisis of 1911. *Philippe Millet*. 19th Cent., 71:1046. June.
- Germany. Basis für eine deutsch-englische Verständigung. *Vice-admiral a. D. v. Eberfeld*. Deutsche R., 37:141. May.
- . Baron Marschall and Anglo-German differences. By *Politicus*. Fort., 91 (97): 905. June.
- . Causes et les conditions d'un rapprochement anglo-allemand, Les. *Commandement de Thomasson*. Q. Dip. 32:257. March.
- . Englische Wolf und das deutsche Lamm, Der. *O. Umfrid*. Friedens-Warte, 14:129. April.
- . Failure of Post-Bismarckian Germany, The. *J. Ellis Barker*. 19th Cent., 71:1059. June.
- . German menace to our sea supremacy. *Archibald Hurd*. Fort., 91 (97): 785. May.
- . Germany and Great Britain. *E. J. Dillon*. Contemp., 101:566. April.
- . How to postpone an Anglo-German war. *Cecil Battine*. Fort., 91 (97): 1049. June.
- . Jurisprudence in Germany. *Edwin M. Borchard*. Columbia L. R., 12:301. April.
- . Lord Haldane et l'Allemagne moderne. *A. de Tarlé*. La Revue, 23:341. June.
- . Lord Haldane: the bond of union between England and Germany. Cur. Lit., 52:407. April.
- . Thoughts on the Anglo-German problem. *Sir Frank Lascelles*. Contemp., 101:1. Jan.
- . Unberechtigte Misstrauen Englands gegen die deutsche Flotte, Das. *Admiral z. D. Breusing*. Deutsche R., 37:257. June.
- Great Britain. Diplomacy and Parliament. *Noel Buxton*, 19th Cent., 71:632. April.
- . Diplomatic cards on the table. *T. H. S. Escott*. Contemp., 101:646. May.
- . International aspects of Home Rule. *Roland C. Usher*. Forum, 47:571. May.
- . Isolation or entanglement? By *Democritus*. Fort., 91 (97):983. June.
- . Our foreign policy and its reform. Contemp., 101:644. April.
- . Saxon-American relations, 1778-1828. *Wm. E. Linglebach*. Amer. hisr. R., 17:517. April.
- Hague Conventions. Adhesioni e ratifiche delle convenzioni dell'Aja 18. Ottobre, 1907. R. di dir. int. Seconde serie, 1:69.
- . Alinéa (h) de l'article 23 du Règlement concernant les lois et coutumes de la guerre sur terre. Par *T. E. Holland*. Traduit par *Ernest Nys*. R. de dr. int. et de légis. comp., 14:91.
- Hungary. Hungary and the Southern slavs. *R. W. Seton-Watson*. Contemp., 101:820. June.

- Immigration*.—Législation sur l'immigration et la restriction de la main d'œuvre étrangère aux Etats-Unis. Q. Dip., 32:276, 351. March.
- Industrial Property*. Conférence de Washington pour la protection de la propriété industrielle. 1911. Léon Poinsard. R. de dr. int. privé et de dr. pénal int., 8:21. Jan.-Feb.-March.
- International Commissions*. Commissions internationales d'enquête, Les. Nicolas Politis. R. gén. de dr. int. public, 19:149. March-April.
- International Law*. Diplomatic affairs and international law. Paul S. Reinsch. Am. pol. sci. R., 6:17. Feb.
- . Völkerrecht und Politik. Prof. Dr. v. Ullmann. Deutsche R., 37:174. May.
- Interparliamentary Union*. Union interparlementaire et les relations internationales, L'. Edouard Rolin. R. de dr. int. et de légis. comp., 14:43.
- . Union interparlementaire. Sécession du groupe Italien. E[douard] R[olin]. R. de dr. int. et de légis. comp., 14:194.
- Italy*. Formazione del regno d'Italia nei riguardi del diritto internazionale, La. D. Anzilotti. R. di dir. int. Seconde serie, 1:1.
- . Politische Plaudereien aus Italien. Marco Ellins. Öster. Rundsch., 31:86. April.
- Japan*. Japan to-day. Hamilton Holt. Ind., 72:878, 989, 1039. May.
- . Japanese culture of the arts of peace. Viscount Chinda. Oriental R., 2:463. June.
- Joint High Commission*. International grand jury. Wm. I. Hull. Ind., 72:11. Jan.
- Judiciary*. Importance of an independent judiciary, The. Elihu Root. Ind. 72: 704. April.
- Libya*. Internationalisation of Libya. Max Kolben. Peace Movement, Vol. 1:112. April.
- . Internationalisation de la Lybie. Max Kolben. Mouvement Pacifiste, 1:112. April.
- . Internationalisierung Lybiens. Max Kolben. Die Friedens-Bewegung, 1:112. April.
- Macedonia*. Question macédonienne, La. Joseph Aulneau. R. pol. et parl., 72:34. April.
- Mediterranean*. Maitrise de la Méditerranée: l'appoint anglaise et l'appoint russe; la question des détroits. Commandant de Thomasson. Q. Dip., 32:577. May.
- Mexico*. Diplomatie mexicaine, La. R. Rougier. Clunet, 39:780.
- . Europe urges Taft on in Mexico. Cur. Lit., 52:388. April.
- . Hopeful side in Mexico. World's Work. 24:15. May.
- . Issue in Mexico. Outlook, 101:23. May.
- . New Revolution in Mexico. Cur. Lit., 52:262. March.
- . Passing of a dictator. R. W. Ritchie. Harper's M., 124:782. April.
- . Revolution in Mexico. Cur. Lit., 52:506. May.
- . Serious nature of Mexico's crisis. Cur. Lit., 52:506. May.
- . Warning to Mexico. Outlook, 100:879.* April.
- Mongolia*. Secession of Mongolia from China, The. E. J. Dillon, Contemp. 101:579. April.

- Monroe Doctrine.* Aspects of American society and policy. *B. Moses.* Atlantic, 109:589. May.
- . Japanese designs upon the Monroe Doctrine. *Cur. Lit.*, 52:510. May.
- . Letter to Uncle Sam. *Junius, Junior.* Atlantic, 109:172. Feb.
- . Menace of the Monroe Doctrine. *Ind.*, 72:1182. May.
- Morocco.* Aube du protectorat Marocain, L'. *L'Afrique Fran.*, 22:83, 172. March-May.
- . Bases du protectorat francais au Maroc, Les. *Eugene Godefroy.* Le Corresp., 84:556. May.
- . Accord franco-allemand devant le Sénat, L'. *Jules L. Puech.* La paix par le droit., 22:175. March.
- . Convention et les traités secrets, La. *Albert Dauzat.* R. pol. et parl., 72:371. May.
- . Effort militaire de l'Espagne au Maroc. *Colonel Malletterre.* Q. Dip., 32:597. May.
- . Francia, España e Inglaterra in Marruecos. *Nuestro Tiempo*, 12:5. April.
- . Frankreichs Reformpläne in Marokko. *Dr. F. von Mackay.* Kol. Zeit., 13:281, 329. May.
- . Notre protectorat au Maroc. *L. Rolland-Chevellon.* Nouvelle R., 37:3. May.
- . Operations espagnoles sur le Maroc. *Berthe Delaunay.* Grande R., 16:341. March.
- . Première intervention Européenne au Maroc, La. *Leon Homo.* R. des deux mondes 9:406. May.
- Naries.* Naval estimates and Germany. *By Diplomatist.* Empire, 23:151. April.
- Navigation.* Schifffahrtsabgaben die Reichsverfassung und das Völkerrecht. *Adolf Arndt.* Jahr. f. Gesetzgebung, Verwalt. und Volksw. im Deutschen Reich, 36:357.
- Netherlands.* Seefahrt. *Prof. Flamm.* Deutsche R., 37:261. June.
- . Presse politique néerlandaise, La. *Ernest Lémonon.* Q. Dip., 32:602. May.
- Neutrality.* Strengthening the neutrality laws. *Nation*, 94:278. March.
- Opium Conference.* International Opium Conference at The Hague, The. *Sir William Collins.* Contemp., 101:317. March.
- Panama Canal.* Case against Panama Canal tolls. *H. M. Chittenden.* Forum, 47:486. April.
- . Fortifications du canal de Panama, Les. *Commandant Davin.* Q. Dip., 32:408. April.
- . Guarding the Panama plum tree. *Cur. Lit.*, 52:416. April.
- Pan American Affairs.* Central American tour of Secretary Knox. *W. W. Rason.* Pan-Amer. M., 13:9. May.
- . Secretary Knox's Carribean trip. *Cur. Lit.*, 52:396. April.
- . Visit of Secretary Knox to Central America. *Pan-Amer. M.*, 13:22. April.
- . With the Knox mission to Central America. *W. B. Hale.* World's Work, 24:183. June.
- Passports.* Necessity of passports for alien women. *A. Otis.* Lippinc., 89:528. April.

- . Passport question in Russia. *Ind.*, 71:1340, 1353. Dec.
- Peace.* Aufgaben der III Haager Konferenz, Die. *Jarousse de Sillac.* Friedens-Warte, 14:134, 180. April, May.
- . Bankers as peace guardians. *D. S. Jordan.* World To-Day, 21:1786. Feb.
- . Chinesische Revolution und der Weltfriede, Die. *Graf Shigenohu Okuma* Friedens-Warte, 14:164. May.
- . Constructive peace movement. *James Brown Scott.* World To-Day 21:1789. Feb.
- . Demokratie und die Friedens-Idee im Heutigen Frankreich, Die. *Hermann Fernau.* Friedens-Warte, 14:173. May.
- . Dream of perpetual peace. *Liv. Age*, 272:237. Jan.
- . Innere Friede, Der. *Ludwig von Bar.* Deutsche R., 37:317. June.
- . Italian manifesto against war. *R. of R.*, 45:98. Jan.
- . Let us have peace. *J. H. Jowett.* Chaut., 66:389. May.
- . Peace. An interview with the author of "The Terrible Meek." *M. J. Moses.* *Ind.* 72:725. April.
- . Peace day. Suggestions and material for its observance. *U. S. Bur. of Educ. Bul.* 1912, 8:1.
- . Peace movement and the Holy Alliance. *Edinb. R.*, 215:405. April.
- . Peace on earth. *Ind.*, 71:1411. Dec.
- . Petition Eckstein et le pacifisme. *La paix par le droit*, 22:228. April.
- . Science and international good will. *J. M. Cattell.* *Pop. Sci.*, 80:405. April.
- . Twelve months of the peace movement. *Denys P. Myers.* *Chaut.*, 66:377. May.
- Persia.* Bluffing the lion and the bear. *E. A. Powell.* *Collier's*, 48:13. Dec.
- . British diplomacy in Persia. *Liv. Age*, 272:116. Jan.
- . Chance they get. *Nation*, 93:540. Dec.
- . Cossack rule in Persia. *W. M. Shuster.* *Hearst's M.*, 21:2045. April.
- . Fate of Persia. *R. Machray.* *Fort.*, 91 (97):291. Feb.
- . Iranian and Slav. *E. J. Dillon.* *Contemp.*, 101:115. Jan.
- . Most Christian powers. *S. Low.* *Fort. R.*, 91 (97):414.
- . Persia and the powers. *Outlook*, 99:897. Dec.
- . Persia's fight for life. *W. M. Shuster.* *Hearst's M.*, 21:2234. May.
- . Persia overpowered. *Ind.*, 71:1462. Dec.
- . Persia's play at constitutionalism. *E. J. Dillon.* *Contemp.*, 101:419. March.
- . Persia, Russia and Great Britain. *Outlook*, 100:4. Jan.
- . Persian executions. *Ind.*, 72:103. Jan.
- . Persian situation. *Ind.*, 71:1295; 72:6. Dec., Jan.
- . Russia triumphs in Persia. *Outlook*, 99:1035. Dec.
- . Shuster dismissed. *Ind.*, 71:1427. Dec.
- . Shuster in Persia. *Ind.*, 71:1360. Dec.
- . Shuster's Speech. *Liv. Age*, 272:626. March.
- . Sir Edward Grey on Persia. *H. F. B. Lynch.* *Contemp.*, 101:10. Jan.

- Portugal.* Portuguese Republic, The. *Aubrey F. G. Bell.* *Contemp.*, 101:370. March.
- Protectorates.* État protectioniste, L'. Ses risques et ses charges. *Yves Guyot.* *R. econ. int.*, 2:69. April.
- . Protectorat colonial, Le. *Jules Harmand.* *R. bleue*, 50:616. May.
- Railroads.* Chemins de fer chinois, Les. *Raoul Bande.* *La France de Demain*, 17:136. March.
- . Projet de chemin de fer transafricain. *Robert Doucet.* *Q. Dip.*, 32:415. April.
- . Chemin de fer de Bagdad, Le. *F. Dubief.* *R. econ. int.*, 2:5. April.
- Red Cross.* American national Red Cross: handmaiden of arbitration. *G. G. Hill.* *Cent.*, 84:131. May.
- . International Red Cross in session. *J. Van Schaick, Jr.* *Survey*, 28:345. May.
- . Red Cross conference and exhibit. *Outlook*, 101:146. May.
- . Sign of the Red Cross. *Hamilton W. Mabie.* *Outlook*, 101:123. May.
- . Organization internationale de la Croix Rouge. A l'occasion de la prochaine conférence de Washington. *R. Ruzé.* *R. gén. de dr. int. public*, 18:229. March-April.
- Renvoi.* Théorie du renvoi dans la jurisprudence anglaise. *N. Bentwich.* *Clunet*, 39:716.
- Sea Power.* Pageant of the mastery of the sea. *K. D. Kotes.* *Westm.*, 177:155. Feb.
- Servitudes.* Diritto di pesca. — Servitù internazionali. — Limite delle acque territoriali. *D. Anzilotti.* *R. di dir. int. Seconde serie*, 1:81.
- Slavery.* Portuguese slavery. *J. H. Harris.* *Contemp.*, 101:635. May.
- . Slaves of Yucatan, The. *Henry Baerlein.* *Contemp.*, 101:254. Feb.
- South America.* Révolution sud-Américaine, La. *J. Mancini.* *La Revue*, 23:356. June.
- South Pole.* Amundsen discovers the South Pole. *Cur. Lit.*, 52:377. April.
- Spain.* Espagne actuelle, L'. *M. Aguilera.* *La Revue*, 23:299. June.
- . Impasse espagnole, L'. *Commandant de Thomasson.* *Q. Dip.*, 32:385. April.
- Stead, William T.* *Stead.* *Alfred H. Fried.* *Friedens-Warte*, 14:168. May.
- . Stead the journalist. *Albert Shaw.* *R. of R.*, 45:689. June.
- . W. T. Stead. *Millicent Garrett Fawcett, Canon H. Scott-Holland, and E. T. Cook.* *Contemp.*, 101:609. May.
- Student Movement.* Internationale Studentenbewegung, Die. *Louis P. Lochner.* *Friedens-Warte*, 14:171. May.
- Sudan.* Anglo-Egyptian Sudan. *E. A. Stanton.* *J. of the African Soc.*, 11:261. April.
- Sugar.* Union sucrière international, L'. *Jules Borel.* *R. de dr. int. et de légis. comp.* 14:150.
- . Brussels Sugar Convention. [October, 1911]. *T. Lough.* *Eng. R.*, 11:135. April.
- Texas.* British correspondence concerning Texas. Edited by *Ephraim Douglass Adams.* *Q. of Texas State Hist. Assoc.*, 15:294. April.

- . Diplomatic relations of Texas and the United States. 1839-43. *Thomas Mailland Marshall*. Q. of Texas State Hist. Assoc., 15:267. April.
- Trade*. The first English-Japanese trade treaty, signed by Tokugawa Iyeyasu in 1613. *Oriental R.*, 2:349. May.
- . American commerce and capital abroad. *John Ball Osborne*. N. Amer. R., 195:687. May.
- Treaties*. Treaties and their value. R. of R., 45:132. Feb.
- Trent Affair*. Trent affair, The. *Charles F. Adams*. Am. Hist. R., 17:540. April.
- Triple Alliance*. Italy's policy and her position in Europe. *J. Ellis Barker*. Fort. R., 91 (97):11. Jan.
- . Österreich-Ungarn, Russland und Italien. Von "Einem österreichischen Politiker." Öster. Rundsch., 31:171. May.
- Tripoli*. Delle cosiddette "occupazione qualificate. *C. Ghirardini*. R. di dir. int. Seconde serie, 1:34.
- . Europe et la guerre italo-turque, L'. *René Pinon*. R. des deux mondes, 9:599. June.
- . Failure of Russia's efforts to stop the war. *E. J. Dillon*. Contemp., 101:574. April.
- . Friede zwischen Italien und der Türkei. *Hans Wehberg*. Friedens-Warte, 14:132. April.
- . Guerre italo-turque et le droit des gens. *Andréa Rapisardi-Mirabelli*. R. de dr. int. et de légis. comp., 14:159.
- . Invasion of Tripoli, The. "Master Mariner." Contemp., 101:49. Jan.
- . Illusion Tripolitaine, L'. *Viscount Combes de Lestrade*. Le Corresp., 84:3. April.
- . Italienische Gefahr, Die. "Spectator Germanicus." Suddeutsche Monatsh., 9:337. June.
- . Mobilisation et les effectifs du corps expéditionnaire italien de Tripolitaine. *Colonel Mallette*. Q. Dip., 32:321. March.
- . Nostra guerra con las Turchia, La. R. di dir. int. Seconde serie, 1:54.
- . Senussi and the military strength in Tripoli, The. *A. Silva White*. 19th Cent., 71:1202. June.
- . Story of Russia's persistent efforts to stop the war, The. *E. J. Dillon*. Contemp. R., 101:427. March.
- . Turco-Italian war; how long will it last, The. *E. J. Dillon*. Contemp., 101:270. Feb.
- . War between Italy and Turkey. Fears of powers over the Balkans. Cur. Lit., 52:17. May.
- Turkey*. Réforme militaire Ottomane, La. *E. N.* Q. Dip., 32:287, 332. March.
- . Presse musulmane, La. *H. Marchand*. Q. Dip., 32:470. April.
- . Situation in Turkey, The. *Sir Edwin Pears*. Contemp., 101:761. June.
- United States of America*. American diplomacy in Central America. *P. M. Brown*. Am. Pol. Sci. R., 6:sup. 152. Feb.
- . American foreign policy. *Sydney Brooks*. Liv. Age, 271:603. Dec.
- . American influences in the Far East. *I. Nitobe*. Univ. Chicago M., 4:103. Feb.

- . Dollar diplomacy and the Pacific Coast. *A. R. Pinci*. *Overland*, n. s., 59:317. April.
- . Our country the world. *H. H. Bridgman*. *New England M.*, n. s., 45:324. Nov.
- . De l'organisation et des attributions du corps consulaire des Etats-Unis d'Amérique. *Ernest Lehr*. *R. de dr. int. et de légis. comp.*, 14:5.
- . Our first treaty with France. *Chauncey M. Depew*. *National M.*, 36:150. May.
- . Point of view of Latin America on the inter-American policy of the United States. *H. Gil*. *Am. Pol. Sci. R.*, 6:sup. 164. Feb.
- . Your United States. *Arnold Bennett*. *Harper's*, 124:651, 892. April, May.
- War. America's lost opportunity to end war. *Cur. Lit.*, 52:193. Feb.
- . Bankers as peace guardians. *David S. Jordan*. *World To-Day*, 21:1786. Feb.
- . Causes économiques de la guerre, Les. *Ch. Gide*. *Mouvement Pacifiste*, 1:134. May.
- . Chief causes of war to-day, The. *Lujo Brentano*. *Peace movement*, 1:96. April.
- . Deutsche Volksernährung im Kriege. *Georg Frölich*. *Jahr. f. Gesetzgebung Verwalt. und Volksw. in Deutschen Reich*, 36:61.
- . Do wars originate in economic causes? *Charles Gide*. *Peace Movement*, 1:130. May.
- . Foreclosing the mortgage on war. *David S. Jordan*. *World's Work*, 24:205. June.
- . Great Britain, Germany and limited war. *Edinb. R.*, 215:484. April.
- . "Great Illusion, The." *Alfred T. Mahan*. *N. Amer. R.*, 195:319. March.
- . "Great Illusion, The." Reply to A. T. Mahan. *Norman Angell*. *N. Amer. R.*, 195:754. June.
- . Heutigen Hauptursachen des Krieges, Die. *Lujo Brentano*. *Die Friedens-Bewegung*, 1:95, April.
- . Insurance of peace. *J. M. Palmer*. *Scrib. M.*, 51:186. Feb.
- . Is war essential to heroism? *R. of R.*, 45:349. March.
- . Krieg — ein Gebot Gotte, Der. *Richard Gädke*. *Friedens-Warte*, 14:84. March.
- . Krieg, der Vater aller Dinge, Der. *Richard Gädke*. *Friedens-Warte*, 14:166. May.
- . Place of doctrine in war. *Edinb. R.*, 215:1. Jan.
- . Place of force in international relations. *A. T. Mahan*. *N. Amer. R.*, 195:28. Jan.
- . Principales causes de l'insecurite actuelle, Les. *Lujo Brentano*. *Le Mouvement Pacifiste*, 1:96. April.
- . Russische Generalstabswerk über den Krieg mit Japan, Das. *Von v. Kurnatowski*. *Deutsche Runds.*, 38:153. April.
- . Soldier or the ballot, The. *David Lambuth*. *Ind.*, 72:829. April.
- . Spirit of 1812. *James Barnes*. *Harpers M.*, 124:839. May.
- . Ueber das Kriegsgespenst in Europa. *von Mannisch*. *Deutsche R.*, 37:269. June.

- . War and business. *C. Childe*. *Harper's M.*, 55:12. Dec.
- . War and civilization. *R. M. MacIver*. *Int. J. Ethics*, 22:127. Jan.
- . War and the world's community of interests. *R. of R.*, 45:475. April.
- . War as a moral agency. *William Dean Howells*. *Harper's M.*, 124:309. Jan.
- . Wirtschaftlichen Ursachen des Krieges, Die. *Charles Gide*. *Die Friedens-Bewegung*, 1:124. May.
- . World's unrest in Tripoli, Persia and China. *World's Work*, 23:458. Feb.
- Woman Suffrage*. Position of woman suffrage, The. *E. Crayshay-Williams*. *Contemp.*, 101:840. June.

KATHRYN SELLERS.

THE "PROTOCOLE ADDITIONNEL" TO THE INTERNATIONAL PRIZE COURT CONVENTION

On September 19, 1910, at The Hague, plenipotentiaries of the following nations: Germany, United States of America, Argentine Republic, Austria-Hungary, Chile, Denmark, Spain, France, Great Britain, Japan, Norway, Netherlands and Sweden, signed an instrument entitled *Protocole Additionnel à la Convention XII de la Haye du 18 Octobre, 1907*.¹ The protocol is by its own provisions (Art. 8) to be considered as forming an integral part of the Convention creating the International Court of Prize; and the acceptance of the *protocole additionnel* is likewise made² *a sine qua non* to the acceptance of the original convention.

The *protocole additionnel* seeks to create a different remedy and a modified procedure *par dérogation* to Articles 28 (paragraph one), 29 and 45 (paragraph two) of the Prize Court Convention and by eliminating Article 8 of the convention entirely and substituting therefor a method preserving the appearance of an action *de novo* in the International Court and confining its judgment to the ascertainment of the damages to be allowed an injured claimant. It is the practical embodiment of the *vœu* adopted by the London Naval Conference in 1909 at the instance of the delegation of the United States (acting under instructions from their government); and is intended to offer a means whereby certain nations named as parties to the protocol may obviate constitutional difficulties in the way of their ratifying the original convention.³

¹ An English translation is given in AMERICAN JOURNAL OF INTERNATIONAL LAW, Supplement to Vol. V, pp. 95-99. The French text is given by Charles Dupuis in the Appendix to *Le Droit de la Guerre Maritime* (Paris, 1911) with, however, a material omission, namely, the entire second paragraph of Article 2.

² Article 9. L'adhésion à la Convention est subordonnée à l'adhésion au présent protocole additionnel.

³ For a statement of these difficulties, see "The International Court of Prize," by James Brown Scott in AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. V, pp. 302-324. Professor Scott was the plenipotentiary of the United States by whom the *protocole additionnel* was signed.

The plenipotentiaries, who signed the protocol at The Hague in 1910, were not the successors to the body that adopted the convention relating to the International Court of Prize, for they were not similarly convened or constituted. They were without power to amend said convention. That they recognized this is apparent from the form and terms of the *protocole additionnel*. The protocol specifically names the parties to the contract, being the thirteen Powers by whose plenipotentiaries it was signed. It is an agreement between them and them alone.⁴ It grants no other one of the thirty-one Powers signatory to the original convention, to which it is supplemental, the right or privilege of becoming a party to the protocol — such as were granted non-signatories in Article 53 of the original convention itself and in Article 70 of the Declaration of London.

Assuming that a way will be opened for other Powers to join in the *protocole additionnel*, and that the International Prize Court will be accepted in some form, the constitution of the court will vary with respect to the form of the ratifications of the Powers as follows: (1) as to that group of Powers ratifying unconditionally the original convention alone; (2) as to that group ratifying the original convention coupled with the Declaration of London; (3) as to that group ratifying the original convention, the Declaration of London, and the *protocole additionnel*; (4) as to that group ratifying the original convention and the *protocole additionnel*.

It is not without the bounds of reasonable probability, if ratifications should be general, all four groups would be represented, and an interesting situation created which it is not our purpose to analyze here. We have now to do only with the third and fourth groups, those including in their ratifications the *protocole additionnel*, and to consider some of the

⁴ It is interesting to consider in this connection the explanation, which was commended by the American delegation, given in the London Conference by M. Renault in presenting the report of the committee to which the American proposal, later embodied in the *protocole additionnel* was referred: " * * * seules les trente et une Puissances Signataires pourront décider ces modifications, toutes étant d'accord. Le Gouvernement des États-Unis d'Amérique pourra faire, après la Conférence, une proposition dans un esprit conforme à celui qui est indiqué par le vœu, et cette proposition devra être admise par l'ensemble de tous les États Signataires." Page 223. *Proceedings of the International Naval Conference*, British Parliamentary Papers, Miscellaneous, No. 5 (1909).

legal and practical consequences following the adoption of the alternative remedy and procedure described in said protocol.

We are immediately confronted with a dual system—on the one hand, without the *protocole additionnel*, the International Prize Court is in a real and judicial sense a court, operating directly upon the *res* involved; affirming or reversing the judgments of national tribunals; and, in a proper case, decreeing the restitution of ship or cargo, or both, and incidental damages, or damages generally; communicating directly with the national tribunals, which will be bound to conform to its procedure and to execute its judgments;⁵ on the other hand, with the *protocole additionnel*, a systematic avoidance of all communication between the national tribunals and the International Court, an express provision that the national judgments shall not be affirmed or reversed (implying, of course, that they may be executed even with an appeal pending), and no form of decree authorized except that the International Court "determines" the amount of damages to be allowed the claimant, if the capture is "considered" illegal.⁶ In the one case, a court of appeal, in the other, a board of inquiry.

The expedient advanced by the United States for obviating the obstacles interposed by its Constitution has very generally been described by European authorities as ingenious, and by one as an evidence "de la souplesse des actes internationaux."⁷ In the mass of bigger problems, however, arising out of the revolutionary proposal to create an international court and codify the rules of naval war, international publicists have passed lightly over the "American proposal," treating it as a matter of internal concern to particular Powers. A few others, evidently assuming that the Powers authorized to avail themselves of the alternative method provided by the protocol will gain special advantages,

⁵ Cf. Article 9 of the Prize Court Convention. The Naval Prize Bill presented by the British Ministry and passed by the House of Commons, Dec 8, 1911, but rejected by the House of Lords, Dec. 15, 1911, provides in Sec. 28, Part III: "The High Court and every prize court in a British possession shall enforce within its jurisdiction all orders and decrees of the International Prize Court in appeals and cases transferred to the Court under this Part of this Act." (1 and 2 George V, Bill 334.) The Ministry recently announced its intention to re-introduce the bill.

⁶ Article 2, *Protocole additionnel*.

⁷ Dupuis, Charles, *Le Droit de la Guerre Maritime* (1911), p. ix.

have failed to appreciate the sincerity of the United States in this matter.⁸

It is but just to the United States, and it is important as a matter of construction of the *protocole additionnel*, to advert to the fact that the proposal of an alternative procedure, as originally made by the United States in the London Naval Conference, contained no reference to constitutional difficulties, nor did it limit to a defined class of Powers the option of adopting the alternative method. The instructions of the Department of State (Secretary Root) on this point to the delegates of the United States in said conference will make this clear. They were as follows:

In the view of the Department, the following draft would be not merely satisfactory, but calculated to remove the objections made to the establishment of the International Court of Prize: Any signatory to the Convention for the establishment of an International Court of Prize, signed at The Hague on October 18, 1907, may provide in the act of ratification thereof, that, in lieu of subjecting the judgments of the courts of such signatory Powers to review upon appeal by the International Court of Prize, any prize case to which such signatory is a party shall be subject to examination *de novo* upon the question of the captor's liability for an alleged illegal capture, and, in the event that the International Court of Prize finds liability upon such examination *de novo*, it shall determine and assess the damages to be paid by the country of the captor to the injured party by reason of the illegal capture.⁹

The proposal of the United States, while it contemplated the possibility of a dual system of procedure before the International Court of Prize, designed to preserve the absolute equality of all the signatories by extending to all the option of adopting either system. Had it been accepted as made, it is not improbable that all Powers, in order to avoid any possible inequality, would have exercised the option granted and chosen the alternative method outlined in the American proposal, which,

⁸ As one instance, M. Charles Ozanam in his *La Juridiction Internationale des Prises Maritimes* (1910), at p. 223, speaking of the *vœu* adopted by the London Naval Conference, says: "Cette dualité nous paraît fâcheuse. * * * il est à craindre que l'opinion publique ne perçoive pas bien nettement l'argutie constitutionnelle qui motive cette dissemblance de traitement."

⁹ Quoted by Scott, J. B., in article cited, p. 312.

as Niemeyer intimates,¹⁰ possesses in and of itself some advantages. In that event, the dual system would have vanished, and the original convention simply have been amended materially in a very novel way.

Whether unfortunately or not, we do not say — neither the London Naval Conference in its expressed *vœu*, nor the plenipotentiaries signing the *protocole additionnel* cared to make a matter of local concern to the United States the occasion of a general proposal to amend the original convention in a very essential particular. Both, therefore, confined the application of the alternative method involved in the American proposal to "the Powers signatory to the Hague Convention of the 18th of October, 1907, relative to the establishment of an International Court of Prize, and those subsequently adhering thereto, *for which constitutional difficulties stand in the way of their accepting the said convention in its present form.*"¹¹ It is important to note in this connection that the assumption as, for instance, by Pohl, Ozanam and Niemeyer¹² that all the Powers may and will yet adopt the alternative method, is incorrect. Whether its constitution prevents acceptance of the Prize Court Convention, each Power must obviously determine for itself. But many nations, Great Britain, for instance, beyond all question, do not fall within the category of Powers described in the protocol; and it is not to be assumed that any Power will stultify itself by including itself in said category — contrary to general expectation and after ratification — when, in fact, it has no "constitutional difficulties" to contend with.

There seems, therefore, no escape from a dual system, unless all the Powers represented in the London Naval Conference and at The Hague in 1910, have misconstrued Article 8 of the original convention relating to the content of the judgment of the International Court of Prize. A recent

¹⁰ Niemeyer, Theodor, *Das Seekriegsrecht nach der Londoner Deklaration* (1910), p. 11.

¹¹ Article 1, *Protocole additionnel*.

¹² Pohl, Heinrich, *Deutsche Preisengerichtsbarkeit* (1911), p. 163.

Niemeyer, Theodor, work cited, p. 11.

Ozanam, Charles, work cited, p. 224, says: "Cet inconvénient, du reste, amènera peut-être alors toutes les puissances signataires à insérer elles aussi cette réserve, de sorte que l'égalité serait rétablie sur le pied du système Américain."

It is but just to say as to the last two writers that their opinion was expressed before the publication of the *protocole additionnel* and as to the first that it is apparent he likewise had no knowledge of it.

German writer has advanced an idea — more ingenious than sound — that the operation of the original convention is in no wise altered by the proposal of the United States;¹³ that the following provision of the original convention, to-wit: "If the ship or cargo has been sold or destroyed, the court determines the indemnity to be paid the owner,"¹⁴ authorizes the captor, at any time before the actual publication of the judgment of the International Court, to sell (or destroy¹⁵) vessel or cargo. In that event, the appellate court awards only damages without reversing the judgment of the national court, for obviously it would be vain to order the restitution of property that had by sale or destruction passed beyond the control of the national court. "Thus," says Pohl (I translate), "it is in the power of the capturing state to say in which form it will hold the claimant harmless, whether by restitution or by money-damages."¹⁶ In other words, the alternative method (the action in damages) is already provided for all Powers alike; and the United States may cease to plague herself and the world in general with her constitutional difficulties — only she must be careful to sell or destroy her prizes before the actual publication of the decree of the International Court.

This fine-spun subtlety does violence to the exalted purpose which the Second Peace Conference sought to put into realizable form in planning an International Court of Prize. By way of contrast, it makes that purpose stand out clear. This ill-founded theoretical deduction seeks to eliminate, for all practical purposes, any remedy in the appellate court except compensation in damages. It would leave the belligerent the same free hand, as of old, to invade peaceful commerce, and seize forcibly and appropriate to its own use, according as the need is great, the vessels and other private property of neutrals. The old obnoxious conditions are left to prevail, with the exception that the neutral victim may hope, at the end of a long, expensive and unequal litigation, conducted in a remote country, to be compensated for his loss. His country, being party to the International Prize Court Convention, is barred from press-

¹³ Pohl, work cited, pp. 159-163 inclusive.

¹⁴ Article 8, paragraph 2, sentence 2.

¹⁵ Parenthesis mine. Pohl studiously avoids drawing his conclusion to this extent — which, as I see it, he must do to be consistent. If the captor may sell, he may, by parity of reasoning, destroy ship or cargo.

¹⁶ Work cited, p. 160.

ing a diplomatic claim in his behalf — as has so often effectively been done heretofore. Conversely, the belligerent, also a party to the convention, is relieved of direct responsibility to the neutral Power and from the restraint imposed by the risk of reprisals or even war for its arbitrary acts. How far, indeed, may not a belligerent go, in the stress of an awful conflict, in making questionable seizures, if its ultimate obligation is a mere question of money and it gains for itself advantages which it is impossible to calculate in terms of money? In judging the proposal to erect an international prize court and all the problems bound up with it, we must never lose sight of the fact that it is war — the last terrible arbiter of armed force — that first thrusts upon the court anything upon which to operate, and sets the whole scheme in motion. Till then it is dry paper.

Now, the American proposal and Pohl's theory are, in their general effect, identical, and seem to the writer to tear the heart out of a noble plan. Let us examine the proposal in the light of this plan.

The proposal of the United States¹⁷ has two definite ends in view, first, the retention of the complete independence of its courts of prize to the extent that it exists now; and second, the abolition as to itself of the power in the International Court of Prize to decree the restitution of a vessel or cargo illegally captured. That these ends would be accomplished by the adoption of the *protocole additionnel* is unquestionable, for its terms are clear and emphatic. So much of the original convention as relates to the ascertainment of damages for seizures "considered" illegal, is to be left unimpaired. The essence of the "système Américain" is the principle of the civil law, *Omnis condemnatio pecuniaria est.*¹⁸ The proposal was laid before the London Naval Conference in an attractive style by M. Louis Renault, as follows:

Il s'agit, sous une autre forme, d'atteindre le même but; au lieu d'annuler une décision, la Cour internationale prononcera une indemnité. Mais le résultat reste le même: le particulier lésé pourra obtenir une nouvelle instance, qui lui fera rendre éventuellement justice. Le chemin est différent, la forme est autre, voilà tout.¹⁹

¹⁷ Let it not be overlooked, as first made by the United States, it extended to *all* signatories.

¹⁸ Cf. Gaius IV, 48.

¹⁹ *Proceedings of the International Naval Conference*, p. 223.

But these views, though plausible, are superficial, and do not take into account the spirit and purposes which lie at the foundation of the efforts to create an International Court of Prize.

It is clear from the language of the Prize Court Convention itself — and more than corroborated by the high hopes expressed by many of its framers — that the spirit and purpose of the convention are to furnish peaceful maritime commerce a security it does not enjoy *now*. If this result is not *certain* to follow the adoption of the convention, all that has been said in praise of it is empty prattle. The security not existing now which the convention offers to peaceful commerce, as may be gathered from the plan as a whole and from the specific terms used in the preamble, consists (1) in the establishment of a means whereby those engaged in peaceful commerce may ascertain by what law of prize any belligerent will be bound; and (2) in the establishment of a system of courts that will effectually hold the belligerent to that law. By these practical and feasible means, the delegates in the Second Peace Conference believed it possible to mitigate the hardships of war, maintain friendly relations between belligerents and neutrals, and further the cause of peace.

The framers of the plan — not only scholars, but statesmen, warriors, and men of affairs — were too practical-minded to believe that the International Court of Prize should create the law of prize. But that it should, as a part of their plan, construe and clear up doubtful matters, and authoritatively declare the law of prize, was but applying the normal system of constitutional law. As the most essential part of the plan, the convention itself proclaims the law which the court shall apply. The convention says to the neutral shipowner before he ventures out upon the high seas or into the belligerent's territory, and to the neutral merchant before his wares leave the storehouse: Here is the law of prize which we ²⁰ will enforce, in the order named, against any belligerent in respect to the question involved, not only at The Hague, but in his own tribunals as well: first, his treaty obligations with your country; second, the rules of maritime war as contained in the Declaration of London of February 26, 1909; ²¹ third, as to questions not covered by treaty or said declaration, the generally recognized rules of international law; fourth,

²⁰ Including the belligerent himself.

²¹ Applicable, of course, only to Powers having ratified the same.

as to questions not covered by any of the above, the general principles of justice and equity; fifth, the published decisions of the International Court of Prize declaring said last named principles or construing or defining any rule or law included in said first three classes.

As to an enemy shipowner or merchant engaged in peaceful commerce — *mirabile dictu* — the convention goes even further and applies, first, the belligerent's own enactments violated by the seizure; second, the published decisions of the International Court of Prize construing or defining such enactments; third to seventh, inclusive,²² the above five classes applicable to neutrals.²³ By this clear cut arrangement, the framers of the new order of prize judicature have sought to make it ultimately possible for every mariner that sails the seas to know his rights and thus be able to defend them not only in the court of last resort at The Hague but in the courts of first instance of every civilized nation of the globe. And would it be too much to believe that in the coming years with the law of prize made increasingly more uniform and certain by further agreement among the Powers and by a collection of enlightened decisions of an august appellate court, the question of "good prize" would narrow down to one of fact, in most cases determinable immediately by the searching officers from an examination of the ship's papers; and that wrongful detentions would prove so vain and unprofitable that few would ever occur, and fewer still need to go beyond the prize tribunal of first instance? This is the glorious but not visionary hope the authors of the convention hold out to the peaceful commerce of every nation in the establishment of a means whereby the law of prize by which any belligerent will be bound may be known by both parties in advance.

Can this hope be realized if the courts of prize of some of the Powers, as articulate members of the judicial system designed by the convention, administer that body of law above classified, whereas the courts of other Powers, enjoying a complete isolation from said system, are left to administer a law of prize in harmony with their several national policies, tradi-

²² We should not lose sight of the legal effect of war on treaty obligations and on the legal relations of the parties.

²³ Compare generally Article 7 of the convention. The article does not make the classification given above. This classification, it is believed, is the logical result of the plan in its entirety.

tions and prejudices? Before answering, let us look into the matter more closely to be sure we have not falsely stated the question.

The question assumes — and we assert — that the Prize Court Convention embraces in its plan not merely an international court but a judicial system, of which the prize courts of those Powers ratifying the convention unconditionally are regarded as articulate members; and further that all the members of this system in every part of the world will administer a uniform body of substantive law. These assumptions are consistent with the benign purposes of the plan. They are, moreover, supported by the language of the convention, and follow as a logical result of the plan.

The very first three articles of the convention constitute the foundation of a system, a correlation of courts upon which the convention confers the power to hear and determine prize causes to the exclusion of every other method. The pertinent facts of these articles, as given in the official text (*italics mine*) are as follows:

Article 1. La validité de la capture * * * est établie devant une juridiction des prises ²⁴ *conformément à la présente Convention.*

Article 2. La juridiction des prises est exercée d'abord par les tribunaux de prises du belligérant capteur.

Article 3. Les décisions des tribunaux de prises nationaux peuvent être l'objet d'un recours devant la Cour internationale des prises.

Here, then, is created a system of courts of first instance and of appeal, and the finality of the decisions of such courts mutually recognized. The validity of a capture, by Article 1, may be absolutely and finally determined in the courts of first instance, as for example, in the event of a failure to appeal from an adverse decision within one hundred and twenty days, as provided in Article 28. In such event, the decisions of the national courts of prize, by virtue of their relation with the plan of the

²⁴ The phrase "une juridiction des prises" is not to be translated "a Prize Court," as in "Encyclopaedia of the Laws of England," 2nd edition, Vol. XI, p. 663, or "a prize court" as in AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. II, SUPPLEMENT, p. 175. The official German translation is "Prisengerichtsbarkeit," not "Prisengericht." The French phrase includes all the courts, trial and appellate, having to do with prize causes. We would suggest "prize courts" or "a prize judicature" as much better than "a Prize Court." The text speaks for itself. The translation, "prize courts" is adopted in the pending British Naval Prize Bill (1 and 2 George V, Bill 334, p. 15).

convention, are vested with a binding effect they never had before. They become more than foreign judgments — they are international judgments, and however erroneous or harsh must be acquiesced in.

The fact that the convention adopts as a part of its system an existing machinery does not militate against the view that it creates a system of its own. In incorporating the national prize courts into its system, moreover, the convention radically changes their character in reducing them from courts of last resort to courts of first instance. It regulates their connection with the appellate court. It even undertakes to modify their internal procedure by prescribing how they shall make their judgments known (Art. 2, paragraph 2), and, in certain cases, to nullify the effects of failure to comply with the national laws as to procedure in these courts (Art. 7, paragraph 5). It limits the number of decrees of the national courts to two (Art. 6, paragraph 1), *i. e.*, it allows not more than one appeal in said courts;²⁵ and, in a given case (Art. 6, paragraph 2), it goes so far as to oust their jurisdiction entirely even as courts of first instance.²⁶ If the convention should be ratified unconditionally by the United States, the jurisdiction and procedure of its prize courts would be controlled by the foregoing terms of the convention and not by prior acts of Congress, for a treaty is co-equal with an act of Congress as part of the supreme law of the land, and would repeal any provisions inconsistent therewith in any prior act of Congress. It must be apparent, therefore, that the national prize courts are to be the instruments of a more comprehensive plan — that they are, by the express provisions of the convention, reconstituted, and then connected with the same supreme

²⁵ This clause of the convention ousts the appellate jurisdiction of the Supreme Court of the United States over all prize causes originating in the District Court of the District of Columbia. This is the only judicial district in the United States in which a prize cause may be prosecuted through *three* national courts. See Sec. 250 of the Act of Congress approved March 3, 1911 (The Judicial Code Act) and Secs. 84 and 226 of the Act of Congress approved March 3, 1901 (District of Columbia Code Act).

²⁶ This would not be true as to those nations claiming the benefit of the *protocole additionnel*, should the same be ratified. With the protocol in force and the law as it now stands, it would be possible, under the clause cited, for a claimant to prosecute his case through the national courts and the International Court of Prize *contemporaneously*. If he invokes directly the International Court and abandons his action in the national courts, he must give up all hope of recovering the specific property taken from him, which, of course, will then be condemned by default.

tribunal, and correlated with one another into a system at once the most unique and the most beneficent the jurisprudence of the ages has yet conceived.

That a uniform body of substantive prize law will be applied by the units in this system in all parts of the world follows rationally. Of course, mooted questions of international law will be viewed differently, until settled by a declaration of the Powers or a judgment of the International Court; matters of discretion, as for instance, the measure of damages, the degree of proof required, standards of value, etc., will be variously decided; procedure will vary not only in respect to its forms but also in respect to its simplicity or complication, its laxity or strictness, and so forth. That these differences would arise, the framers of the convention clearly foresaw. There was no hope of carrying through a measure eliminating them by erecting only international tribunals.²⁷ Indeed, it is questionable if this expedient would offer any advantage over the admirable plan adopted, if the same is executed in good faith. The convention, as is well known, was a compromise retaining the essentials necessary to accomplish in some degree the great ends sought. That the national courts should be left to proceed "*suivant les formes préscrites par leur législation*" (Preamble) was of secondary importance to the idea that they should be co-ordinated with an august appellate court and administer the same substantive law. Of the two evils to be remedied, the possible unfairness of prize courts and the undeniable inequality of prize law, the latter is certainly the graver.

The courts of prize of the various nations regarded as courts of first instance, sustain, in effect, the same relation to the International Court of Prize as inferior municipal courts to their court of last resort. A decision of the Supreme Court of the United States determines not only which party shall recover in the case at bar, but furnishes a precedent — a rule of decision — for similar cases that may arise thereafter. There is no statute requiring the inferior courts to follow such rule of decision, but they do so invariably, willingly and unreservedly yielding up their own opinions or convictions. In other words, the inferior courts decide a cause just as they believe the Supreme Court would decide the same

²⁷ Cf. *Actes et Documents de la Seconde Conférence de la Paix* — Session of July 4, 1907, Vol. II, p. 788, and Session of July 11, 1907, Vol. II, pp. 801, 811.

cause. They do so solely out of regard for the public convenience and in good faith to the purposes and plan of their constitution, for there is no power that can coerce them.

For the same reasons, the prize courts of those nations which will have enacted the convention as supreme law, will try to decide causes just as they believe the International Court of Prize would decide the same causes. They would, therefore, administer the same body of substantive law (with, in most cases, the same degree of fairness). They would do so out of regard for their national convenience — for what sovereign would see any permanent gain in harassing peaceful commerce and offending neutral Powers in contempt of the law by which his captures will finally be adjudicated and restitution certainly decreed with damages? They would do so out of self-respect and a decent regard for the public opinion of the world — for what citizen would not be humiliated by the spectacle of his country repeatedly penalized by an impartial tribunal? They would do so out of self-interest, expecting to receive an ultimate benefit from the effective accomplishment of the lofty purposes prompting the erection of this new system of prize judicature, for is it not apparent that these purposes may be defeated to the detriment of all, if each nation administers a prize law of its own?

If we construe Article 9 of the Prize Court Convention in the light of what has just been said, we may venture to add that the national courts will administer the same substantive law of prize as the International Court because they are legally bound to do so. In said Article, the contracting Powers bind themselves (1) to execute the decisions of the International Court of Prize with the least possible delay, and (2) *to submit in good faith to the same*. If the inferior courts are to be free, as heretofore, to apply their national conceptions of the law of prize and only to execute the mandates of the appellate court in the particular cases appealed, then (2) is meaningless surplusage. But not so. Article 9 is the pulsing heart of the whole treaty. Submitting in good faith to the decisions of the International Court means something in addition to executing them — it means accepting them as correct statements of the law of prize and governing ourselves accordingly. If the International Court of Prize should decide in one case that harvesting machines are not contraband, it certainly would not be submitting in good faith to that

decision for the belligerent affected to continue unabated confiscating such machines, thus needlessly encumbering the dockets of the appellate court and making a mockery of the whole proceeding.

There is little question that the national courts themselves would construe the obligation of their sovereign in this practical way. Thus national honor — reinforced by national convenience, national pride (keenest in time of war), and national self-interest — would dictate that course by which the comprehensive system planned in the convention would operate in all its parts with the least friction. Legitimate commerce — the hand-maiden of peace — would then go about her beneficent work unhampered by doubts; and her unarmed messengers of good-will, bringing relief to helpless non-combatants, would dart in and out through fleets of cannon with a security heretofore unknown.

In this great work, the United States and Powers similarly situated will have no constructive part.

The United States says that the only tribunal of last resort that the constitution permits it to recognize in matters of prize is the Supreme Court of the United States. The construction which this court places upon treaties with foreign nations (including a possible determination of the nullity thereof) and upon the Declaration of London, and its enunciation and definition of what are the generally recognized principles of international law, constitute a part of the supreme law of the land, which all departments of the government of the United States (including the war power and the prize courts) are bound to follow. The prize courts cannot by treaty be clothed with power to enforce the contrary or divergent opinion of any other court or tribunal on earth. The decisions, therefore, of the International Court of Prize cannot be made a rule of authority in the prize courts of the United States as to any of the matters above mentioned. As to its decisions defining the "general principles of justice and equity," the same would likewise be without authority in said courts and for the additional reason that the prize courts of the United States being, unlike those of every other great Power, strictly judicial in their constitution, are themselves incapable, in the absence of a law, of administering a remedy solely on the "general principles of justice and equity."²⁸

²⁸ As to the last point, it is but right to say I have not seen it suggested anywhere

If the theory of constitutional law above outlined be correct, the courts of the United States cannot, — and if, too, they are by express consent of the remaining Powers completely isolated from the international prize system and under no obligation to regard it, they certainly will not, — administer the same law of prize as the remainder of the community of civilized states. The old uncertainties must continue. How much they will be multiplied by the action of other Powers, similarly situated as the United States, is unknown. Confusion will arise inevitably, due to national differences of race and character, of traditions and ideals, of needs and interests, of chance and destiny. The entire history of maritime warfare bears this out.

A concrete illustration of how the alternative method allowed by the *protocole additionnel* may work in this respect, is furnished by our own diplomatic history. By the Treaty of Washington of May 8, 1871, there were referred to a mixed commission for arbitration certain claims of British subjects against the United States arising out of alleged illegal captures of British vessels and cargoes during the Civil War. This proceeding involved a review of decisions of the Supreme Court of the United States which, as the prize court of last resort, had rejected all of these claims.²⁹ Among them was the case of the *Sir William Peel*, a British vessel, which was seized on September 11, 1863, while lying at anchor on the Mexican side of the Rio Grande river. She was taken to New Orleans and libeled in prize in the District Court of the United States on the charge of trading with the enemy. On June 6, 1864, an order was entered by this court directing the restitution of the vessel, and on June 3, 1865, a final decree rendered making a finding of probable cause for the capture and dismissing all claims for damages and taxing all costs and charges against the claimants. The claimants and the United States both appealed to the Supreme Court and the appeals were decided together by this court in 1867.³⁰ The vessel and cargo having been, in the meantime, abandoned to the underwriters, were on the part of the United States. It is a rule of our municipal law which I am assuming the courts would be bound to regard.

²⁹ Of the twelve cases submitted, the decisions of the Supreme Court were sustained in six and overruled in six.

³⁰ Decision reported in 5 Wallace (72 United States Supreme Court Reports), pp. 517-536.

paid for as a total loss. Portions of the cargo had been sold by order of the court and the remainder thereof and the ship were released a year after the capture to the insurers upon their having given a bond with security for the appraised value thereof, \$857,642. The ship was brought to England and sold for a little above half its appraised value. The insurers, as assignees, pressed their claim for damages in the Supreme Court on the ground that the capture was *ab initio* wrongful, having been made in neutral waters. But the court denied the prayer for damages, and Chief Justice Chase, delivering the opinion of the court, said:

The weight of evidence, we think, put the vessel, at the time of capture, in Mexican waters; but if the ship or cargo was enemy property, or either was otherwise liable to condemnation, that circumstance, by itself, would not avail the claimants in a prize court. It might constitute a ground of claim by the neutral power, whose territory had suffered trespass, for apology or indemnity. But neither an enemy, nor a neutral acting the part of an enemy, can demand restitution of captured property on the sole ground of capture in neutral waters.³¹

When this same case was thereafter submitted to the arbitral commission above mentioned, an award for \$272,920, as damages, was given the claimants against the United States "on the ground that the capture within the neutral waters of Mexico was absolutely illegal and void, and that the claimants were entitled to make reclamation on that ground, irrespective of any question of complaint or intervention on the part of Mexico."³² Thus the opinion of the Supreme Court was effectively reversed.

A similar case arising in the future, under the new order of prize judicature with the *protocole additionnel*, in effect, could be disposed of on identically the same principles and with the same general result. The war power and the prize courts of the United States are legally bound by the doctrine enunciated by Chief Justice Chase and not by the contrary doctrine followed by the international arbitral commission. The former is to this day the supreme law in the United States, not having since been reversed in the Supreme Court or modified by special enact-

³¹ *Ibid.*, pp. 535-536.

³² The full report of the proceedings before the commission is given in *History and Digest of the International Arbitrations to which the United States has been a Party*, by John Bassett Moore, Vol. 4, pp. 3935-3948.

ment of Congress.³³ However vigorously the International Court of Prize may denounce seizures of neutral vessels in neutral waters as illegal and void (assuming it would take this view), the same will avail nothing against the armed forces of the United States backed up by their national courts.

And thus divergent systems of substantive law will develop in the prize courts of various nations. Indeed, in this particular, the whole plan of the convention will miscarry, for as a means of self-protection and of avoiding inequality, all nations will be driven, as of old, to administer a law of prize in harmony with their several traditions and local preconceptions. In respect to the assurance afforded the neutral by a knowledge of the law by which his maritime ventures are to be judged in the event of dispute, the International Court, however able and impartial it may be, will be of no value whatever, if its declarations of the law are not to be generally applied. It will be merely a "nouvelle instance" whose decisions, in some cases, may serve only to swell the confusion.³⁴

The second element in the security which the convention holds out to peaceful commerce, as we have seen, lies in the establishment of a system of courts that will effectually hold the belligerent to an observance of the rights of mariners and merchants as defined in the body of law

³³ To be excepted from the operation of this rule are those few Powers with which the United States has obligated itself to enforce the contrary doctrine by its ratification of Convention XIII, relating to the rights of neutrals in maritime war, adopted at the Second Peace Conference.

³⁴ It does not impair our argument, on the contrary, it emphasizes it, to note that it is possible, in certain cases, that the national courts may be more generous and liberal in their construction of some aspect of the law of prize than the International Court itself, and thus the dual system at times work to the advantage of the neutral or even of the enemy. As to the United States, this is not at all improbable. To mention a recent instance, the Supreme Court in the cases of *The Paquete Habana* and *the Lola* (175 U. S. Reports, pp. 677-714), decided Jan. 8, 1900, not only granted the public enemy a *persona standi* in court (Lord Stowell always held the enemy absent by operation of law), but also resolved a mooted question of international law in his favor (over the dissent of three of its own members), and reversed the decree of condemnation in the trial court and actually gave the public enemy a judgment for damages, not against the captors, but against the sovereign United States — a relief which it would have denied one of its own citizens if he had not first obtained the consent of the United States to the suit by an act of Congress. It is sincerely hoped the necessities of war will never restrict the degree of magnanimity exercised in this case.

prescribed by the convention. If the *protocole additionnel* should be ratified, the judicial department of the United States, and of other nations following her example, will constitute no part of the international system, and will not administer the same substantive law. How then is a belligerent to be held effectively to the accepted law of maritime warfare if his own courts will not bind him and the appellate court cannot bind them? Here the executive department of the government steps into the breach. As an intermediary, it conducts all the negotiations with the International Court; and it undertakes, in the event of a variance between the opinion of said court and the decree of its own, to procure from the legislative department an appropriation for such damages as the International Court may determine the claimants will suffer by reason of the execution of the decree of the national court. Thus the national courts are to be left to perform their functions absolutely untouched, as freely as if the Prize Court Convention were not in existence. This is the "simple expedient by virtue of which the *question* in controversy instead of the actual *judgment* of the national court" ³⁵ is to be submitted to the International Court of Prize in the nature of a "trial de novo," which, it is hoped, will accomplish the purposes of the treaty "without violating the spirit of the convention, and, indeed, without amending it." ³⁶

The important question now arising is, Will this alternative method effectually hold belligerents availing themselves of it to that uniform body of substantive prize law to be evolved and applied in and through the system of courts designed by the convention? It is of little general consequence that the victims of illegal seizures may be awarded damages by the International Court of Prize in the particular cases appealed. They have an equally effective remedy now by way of diplomatic claim. But what the ordinary satisfaction of a diplomatic claim does not accomplish, or pretend to accomplish, is the grand hope of the new system, namely, *to prevent repetitions of the offense*.

To elucidate these propositions, it would be well to examine briefly

³⁵ *Identic Circular Note of the Secretary of State* (Secretary Knox) to all the signatory Powers of October 18, 1909, given in *AMERICAN JOURNAL OF INTERNATIONAL LAW*, Vol. IV, SUPPLEMENT, p. 107.

³⁶ *Ibid.*, p. 105.

Article 8 of the Prize Court Convention — the crux of the American "difficulties" — and Article 2 of the *protocole additionnel* substituted therefor. The following arrangement will give a graphic comparison.

ARTICLE 8, CONVENTION XII

ARTICLE 2 "PROTOCOLE
ADDITIONNEL"

In the case of an appeal to the International Court of Prize in the form of an action in damages, Article 8 of the convention shall be without application; the court shall not pronounce the validity or invalidity of the capture, nor reverse or affirm the decision of the national courts.

If the court pronounces the capture of the vessel or cargo to be valid, they shall be disposed of in accordance with the laws of the belligerent captor.

If the nullity of the capture is pronounced, the court shall order the restitution of the ship or cargo and fix, if there is occasion, the amount of damages. If the ship or cargo have been sold or destroyed, the court shall determine the indemnity to be paid the owner on this account.

If the nullity of the capture had been pronounced by the national tribunal, the court can only be asked to decide as to damages.

If the capture is considered illegal, the court determines the amount of damages to be allowed, if any, to the claimants.

It is apparent that the convention relies upon a three-fold method to hold belligerents effectually to the accepted law of prize: (1) upon their express obligation to submit to said law and to administer the same in their courts; but if, in the event of an overpowering necessity or of a mistaken self-interest, belligerents disregard their obligations toward peaceful commerce, then (2) upon the power in the International Court to diminish or frustrate any possible advantage from illegal condemnations by ordering the restitution of ship or cargo and assessing incidental damages; and (3) upon the power in the International Court to determine the indemnity to be paid the owners of ship or cargo in the event the same were sold or destroyed *lawfully*, and were not properly subject to condemnation; or in the event the same were sold or destroyed *unlawfully*, then without regard to whether properly subject to condemnation or not.

Without repeating what has heretofore been said, it is clear that in no one of these three particulars will the convention bind the Powers adopting the "action in damages" to an observance of the rights of neutrals, as contemplated in its plan. With the third — certainly the weakest tie of the three — Secretary Knox compares the American proposal. He says,

It is apparent that the convention assumes that the captured vessel or cargo may have been sold, destroyed, or otherwise be beyond the power of the captor, in which case only the question of liability with compensation in damages can be considered.³⁷

But this, as he correctly denominates it in the same connection, is only an "alternative remedy." Moreover, it in no wise assumes an appropriation of neutral property to the belligerent's own use, which is a possibility not excluded by the protocol, to which we cannot shut our eyes. This is a possibility which the convention, on the contrary, by a fair construction of the very sentence of Article 8 (2nd sentence, 2nd paragraph) on which the American proposal is based, designs to exclude.

An unfailing lamp to guide us to a correct understanding of every clause of the convention is the undisputed purpose of its framers to give pacific commerce a security which it does not enjoy now. The convention furnishes direct remedies, where only indirect have heretofore existed. It designs to prevent the invasion of primary rights where heretofore

³⁷ AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. IV, SUPPLEMENT, p. 107.

only compensation could be hoped for. So it would do the utmost violence to the treaty to hold that the sale or destruction of a ship or cargo is authorized or sanctioned by the sentence above referred to before the neutral has been granted the chance of appeal to and a judgment been rendered by an impartial tribunal. Still less could it be said to authorize or permit a forcible appropriation by the belligerent, with or without compensation.

In certain circumstances, the sale and destruction of neutral ships and cargoes before condemnation (which always means final condemnation), are authorized by international law, and the treaty contemplates only such cases. In all such cases, the International Court of Prize will determine whether indemnity is to be allowed or not, in conformity with the rules of international law.

The right to destroy a neutral vessel under any circumstances before final condemnation has often been denied. Lord Stowell, early in the last century, allowed the American owners costs and heavy damages for vessels destroyed by British cruisers.³⁸ "He did not examine whether the ships were properly captured or not: the captor, by his violence, had put himself out of court."³⁹ The Declaration of London likewise prohibits explicitly the destruction of neutral vessels (Art. 48), with an exception that does not concern us here (Art. 49), and provides that in the event of unauthorized destruction, the belligerent must compensate the parties interested "and no examination shall be made of the question whether the capture was valid or not" (Art. 51). Applying these rules, the International Court of Prize, under Article 8 of the convention, will have the power to award a neutral shipowner or merchant damages for an unlawful destruction of his property, regardless of whether the capture was originally valid or not. A powerful incentive to the belligerent to respect the primary property rights of neutral merchantmen in the remotest seas.

There will be no such restraint on those belligerents who are exempted from the provisions of Article 8 by the *protocole additionnel*. These can be fined only "if the capture is considered *illegal*."

³⁸ Cf. The case of the *Actæon*, 2 Dodson's Admiralty Reports, 48, given also in Roscoe's English Prize Cases, Vol. II, p. 209.

³⁹ Baty, T., in *Britain and Sea Law*, p. 3.

In principle, the forcible sale before final condemnation of a neutral's property is the same as the destruction thereof. His right of possession and right of property are just as effectually taken from him with no practical hope of recovery. In fact, in another aspect of the matter, forcible sale is more outrageous and heinous than destruction, for whereas the latter is forced upon the belligerent by the exigencies of his situation to his own loss, the former is most often resorted to deliberately as the most convenient means of dividing the anticipated spoils among the captors or of extorting from the neutral the current fees due government officials for conducting the prosecution against his property.⁴⁰ It is confirmed by history that prize causes are tried almost invariably at the neutral's expense;⁴¹ and that his property should for this purpose be forcibly wrested from him and his title thereto forcibly (I will not say judicially) divested, seems the most iniquitous treatment thinkable. Opinion is divided as to whether such a forcible sale conveys good title.

However that may be, it is clear that on principle the primary right of property of the neutral ought to be respected as a natural right, and no sale made without his consent before final condemnation, except where his own interest palpably justifies it, as in case of perishable goods. The actual practice, however, of some maritime Powers has not been so confined, and there is much confusion in this respect.⁴² In general, it may be said the limitations on the belligerent's right to sell the vessel or cargo belonging to a neutral parallel his right to destroy the same. As early as 1426, Henry VI of England issued a proclamation forbidding the sale of prize goods anywhere but in England or before condemnation. So likewise, the exceptional circumstances excusing a forced sale before adjudication may be regarded as analogous to those excusing destruction of a neutral's property. During the war between the United States and Mexico, a cargo of goods belonging to neutrals was seized by the naval forces of the United States off the coast of California (then Mex-

⁴⁰ In the case of *The Peterhoff*, \$32,968.64 for costs and expenses and \$50,000.00 for counsel fees were deducted from the proceeds of a cargo adjudged illegally captured. Cf. *The Peterhoff* in *Blatchford's Prize Cases*, 381, 463-550; 5 Wallace (72 U. S. Sup. Ct. Reports) 28, and Moore *International Arbitrations, etc.*, Vol. 4, p. 3839.

⁴¹ Cf. Baty, work cited, p. 62.

⁴² Cf. Perels, F., *Das öffentliche Seerecht der Gegenwart*, p. 309, paragraph 58.

ican territory). The cargo was sold before condemnation, it being manifestly impracticable and hazardous to ship it round Cape Horn to a port within the United States for trial. The Supreme Court sustained the action of the captors as coming within the exceptions which excuse the violation of the neutral's natural right, and through Chief Justice Taney uttered the following significant sentence:

But if no sufficient cause is shown to justify the sale, and the conduct of the captor has been unjust and oppressive, the court may refuse to adjudicate upon the validity of the capture, and may award restitution and damages against the captor, although the seizure as prize was originally lawful or made upon probable cause.⁴³

This doctrine is identical with the doctrine as to the unlawful destruction of neutral property, which the Declaration of London pronounces accepted international law. The essence of the wrong being the same, it is safe to believe the International Court of Prize will give the neutral the benefit of the analogous remedy, especially since it is supported by authority.

Under this rule, if adopted, the International Court may award the claimants an indemnity for a sale not authorized by the law of nations, although the seizure as prize was originally lawful. In no event, however, can the court thus penalize any belligerent claiming exemption from Article 8 by virtue of the *protocole additionnel*. The finding that the capture was originally lawful exhausts the jurisdiction of the court. In other words, the convention and the protocol would apply opposite criteria to these cases: by the convention, the unlawfulness of the sale or destruction of the neutral's property precludes an inquiry into the validity of the capture thereof; by the protocol, the validity of the capture of the neutral's property precludes an inquiry into the unlawfulness of the sale or destruction thereof.

The convention aims as far as possible to keep the neutral's property intact. It warns the belligerent not to sell or destroy it without the sanction of international law; not to condemn it wrongfully on pain of making restitution and paying damages; not even to detain it without making adequate amends; and it hopes to make his path of duty so plain that he cannot err therein. But what security does the convention

⁴³ *Jecker, et al. v. Montgomery*, in 13 Howard Reports, 498 (1851).

hold out against the forcible appropriation of a neutral prize by the belligerent to his own use before the same has been finally condemned or even sent in for adjudication? It is silent. An intention so contrary to the rules of international law and natural justice was not to be imputed to any signatory. Certainly, if the contingency should happen, it is safe to presume a remedy at least as direct and stringent, as in the case of an unauthorized sale or destruction of the neutral's goods would be enforced, *i. e.*, an indemnity decreed whether the capture was originally lawful or not. But this penalty, as we have seen, cannot be inflicted on those Powers that avail themselves of the *protocole additionnel*.

It is not assumed that many Powers would thus violate the law of nations, but it is significant that the United States, the prime mover for the *protocole additionnel*, had a statute expressly authorizing the Secretary of the Navy and the Secretary of War to do this very thing.⁴⁴ The exercise of this power by the Government of the United States was further authorized by Section 27 of the Act of Congress of June 30, 1864, which was incorporated into the Revised Statutes of the United States of 1874 (Second Edition, 1878), and as Section 4624 thereof is the supreme law of the land to this day.⁴⁵

⁴⁴ Act of Congress of March 3, 1861, 12 Statutes at Large, 752, § 2.

Great Britain, through its Minister, Lord Lyons, promptly remonstrated against this law. The matter was referred to the Attorney-General, who held the law a valid exercise of the power granted Congress by the Constitution to make rules concerning captures on land and water. But he admitted he was "not aware of any settled doctrine of the law of nations" that permitted a belligerent "at its own pleasure and convenience to appropriate the prize to its own use *before condemnation*." He recommended that the government abstain from using the authority granted, "if there be any danger of dissatisfaction on the part of foreign Powers." Opinion of Atty. Genl. Bates to Secretary of State Seward of Sept. 14, 1863, in Vol. 10, *Opinions of the Attorney General*, pp. 519-522.

If the law is constitutional, the prize courts of the United States will continue to sustain all acts of confiscation done thereunder, though the International Court of Prize may fulminate against it ever so often.

⁴⁵ Revised Statutes, § 4624: "Whenever any captured vessel, arms, munitions, or other material are taken for the use of the United States before it comes into the custody of the prize court, it shall be surveyed, appraised, and inventoried, by persons as competent and impartial as can be obtained, and the survey, appraisal, and inventory shall be sent to the court in which proceedings are to be had; and if taken afterward, sufficient notice shall first be given to enable the court to have the property appraised for the protection of the rights of claimants and captors. In all cases

That the belligerent offers, in such cases, to pay for what he has taken per force is no justification of his conduct. The United States took *The Peterhoff* before judgment, at its own appraisal (some \$40,000 less than the value set upon her by her British owners), less costs and expenses, and *The Nuestra Señora de Regla* even after restitution had been ordered, and paid for her just twenty-three years after she was wrested from citizens of Spain.⁴⁶ Moreover, the offer to compensate is not sincere. It is conditional. It imposes on the unoffending neutral the burden of first proving his innocence before tribunals not of his own selection, which view him with a suspicion natural in times of great national stress toward all foreigners and accentuated by the very act of his arrest. His trial is probably conducted in an unfamiliar procedure and in a strange language, in a remote country and at a time when the ordinary means of communication with his government are interrupted. Meantime, officers and crew are displaced, dispossessed of their floating domicile and stranded in a hostile land, themselves exposed to the risks and hardships of war and left to make their escape as best they can.⁴⁷ In the

of prize property taken for or appropriated to the use of the government, the department for whose use it is taken or appropriated shall deposit the value thereof with the assistant treasurer of the United States nearest to the place of the session of the court, subject to the order of the court in the cause."

Section 4622, Revised Statutes, provides that "if the captured vessel, or any of its cargo or stores, are such as in their judgment may be useful to the United States in war, they (the prize commissioners) shall report the same to the Secretary of the Navy."

Paragraph 24 of General Orders No. 492 of June 20, 1898, *Instructions to the U. S. Blockading Vessels and Cruisers* during the Spanish-American War, is a concrete reassertion of the authority to appropriate a captured vessel or cargo, regardless of their national character, to an immediate public use before condemnation. For. Rel. 1898, p. 782. The same rule was included in the *Code of Naval War*, General Orders No. 551, Navy Department, June 27, 1900.

⁴⁶ Cf. *The Nuestra Señora de Regla*, 108 U. S. Supreme Court Reports, 92-103 (1883).

The necessary appropriation to carry out the decree awarding damages was made by Act of Congress of May 1, 1884 (23 Statutes at Large 15). The seizure was made in 1861.

Restitution was also decreed in the case of *The Peterhoff*. See 5 Wallace Reports (72 U. S. Reports), 28-62.

⁴⁷ One recalls the experiences of the crews of the *Knight Commander* and the *Thea* at Vladivostock and of the *Hipsang* at Port Arthur during the Russo-Japanese War.

litigation, which may be drawn out for many months, and entail a great expense, all the odds are against the neutral. It is so easy, in a miscellaneous cargo, to find contraband, or what the belligerent pleases to deem contraband, and in the mail pouches, letters and dispatches (to say nothing of newspapers which have more than once figured as evidence in prize causes) which are "treasonable in their nature,"⁴⁸ or a defect in the ship's papers, or a deviation from the ship's proper course, or persons on board of suspicious character, any combination of which may make it possible for the belligerent to believe it was the intention (however stoutly it may be denied) of the neutral shipowner or merchant to traffic with the enemy. If these circumstances do not amount to proof (according to the belligerent's standard) so as to defeat the neutral's claim for restitution entirely, they may, at least, furnish "some evidence which justifies suspicion"⁴⁹ and defeat his claim for damages and subject him to the payment of the costs and expenses of the litigation. Boast as we may that our prize courts "belong to other nations as well as our own," the fact remains that the litigation is in every event an unequal one; and all too often the canon of Mathan, "On le craint: tout est examiné," is the rule of decision unconsciously applied. The outermost limit to which a belligerent may go in thus appropriating vessels and cargoes of neutrals to its own use, with or without compensation, is defined only by its own necessities and the effectiveness of the resistance interposed by neutral governments.

Where forcible appropriation takes place in the nature of a prize proceeding, or as incidental thereto, the question arises whether ratification of the International Prize Court Convention does not estop any neutral government from resisting such appropriations by diplomatic means, or reprisals or war, and confine the despoiled shipowners or merchants to the remedy of an appeal to the International Court. We think it does.⁵⁰

Cf. Takahashi, Sukuyé, *International Law applied to the Russo-Japanese War*, pp. 314, 322.

⁴⁸ The alleged ground for the seizure of *The Nuestra Señora de Regla*. See Moore's *International Arbitrations, etc.*, Vol. 2, p. 1017.

⁴⁹ Cf. *The Sir William Peel*, 72 U. S. Supreme Court Reports, page 536.

⁵⁰ Cf. p. 808.

"* * * ainsi la conservation de la paix sera mieux assurée" (Preamble to the Convention).

This is the most significant fact in connection with the whole proposal to create an international system of prize judicature. It involves a real sacrifice of that jealous and vigorous protection with which each nation delights to guard its commerce, its means of sustenance, its very life;⁵¹ in comparison with which the concession of the principle of national sovereignty involved is merely a sacrifice of academic susceptibilities. What security does the convention offer against this invasion of the rights of neutrals better than exists now?

That compensation should be made for property forcibly converted will not be seriously contested by the belligerent; in fact, when a nation in war needs transports or supplies, it will not haggle long over the price, especially if they are to be had on an instant's notice and convenient to the scene of hostile operations. No objection will be made if the price is pushed high enough to allow liberal profits or damages above the actual pecuniary value of the property seized. Indeed, we make bold to say, no mere award in damages in any amount of money the International Court of Prize may have power to arrive at in any prize cause (not even *lucrum cessans*) will tend to prevent recurrences of this high handed transgression of the right of property, when a belligerent feels himself driven to it. There is, indeed, ground for concern that the contrary effect may be produced. A genuine sense of moral obligation to respect promptly the legal rights of neutral commerce may give way to casuistry and temporizing, if belligerents can make full atonement for their offences legally by the mere payment of money.⁵² These remarks would be pertinent, too, even if the court should penalize the captor by awarding damages regardless of the original lawfulness of the seizure.

To compensate for tying the hands of his government and depriving him of its direct and powerful intervention in his behalf, the Prize Court

⁵¹ One recalls the instant effect of the demand of M. Poincaré in January last for the release of the *Carthage* and the *Manouba*. When he reported his action to the Chamber of Deputies, he was given an ovation seldom equalled.

⁵² Cf. Niemeyer, work cited, p. 34. "Diese Momente gehören zu den kalten Wirklichkeiten, welchen die Wissenschaft Rechnung zu tragen hat. Vor ihnen die Augen zu verschliessen, entspräche der Klugheit des Vogels Strauss."

As enlightened a government as Great Britain once spoke of certain illegal acts of confiscation of neutrals' cargoes as "*purchases of said cargoes on behalf of our Government.*" See De Martens *Recueil de Traités*, IV, 605.

Convention offers the neutral shipowner or neutral merchant whose property has been unlawfully confiscated, the assurance of an even more direct and effectual relief. Together with damages, it will command (*ordonne*) the restoration of the property. It will construe any sale of the property by the belligerent to himself at any stage of the proceedings to be a legal impossibility, a fiction and a subterfuge, and treat such property in his possession and use as subject to execution and not beyond the power of the captor. Behind its command stands not only the pledged faith of the belligerent himself and the moral support of the civilized world and all the sanctions of international law; but also, in the event of a violation thereof, and the consequent rescission of the treaty, all the suspended means of redress which the neutral government involved could single-handed, in the first instance, have exercised for the protection of its subject. Moreover, the mandate of the International Court is sent for execution directly to the court of prize which the sovereign Power itself has set up and recognizes as supreme in its dominions in matters of prize, and in whose custody the property is actually or constructively to be found. It operates directly upon the *res* involved, and assures the neutral victim of a certain, speedy and satisfactory relief. Above all, the immediate consequence of this form of relief is to make unlawful seizure and confiscation before final condemnation, with or without a tender of purchase money, unprofitable and abortive, and thus to protect all legitimate commerce against the most dangerous risk likely to disturb it.

The convention assures the neutral further of a security he does not enjoy now in that it guarantees him a full, free and impartial trial before a tribunal upon which his country is represented. It guarantees him a trial before this tribunal *de novo* of the validity of the seizure of his property. Before he has such a trial, it is not contemplated that, pending appeal, his property should be sold, destroyed, or confiscated (except as sanctioned by international law) and thereby entirely new and different issues injected into the case before the Hague Court, possibly at the last moment, first of the validity of such conversion, and second of the proof of values and damages. A suit for damages for conversion in the appellate court, which originated as an action in replevin in the lower court, can hardly be called a trial *de novo* by any of the ordinary definitions of that phrase. The exercise of such an unfair option by the captor

could greatly delay and vex the neutral appellant, increase his expenses, multiply his difficulties in getting evidence after the lapse of months or years, or overtake him at an unfortunate moment or in unfortunate circumstances, and seriously diminish his chances of proving either the wrong done by the belligerent or the full extent of his own damage, in a contest that is at best unequal and extra-legal. The property is his till the last court has spoken.⁵³ That the convention does not expressly provide for the giving by the neutral appellant of a *supersedeas* bond to stay the execution of the judgment of the national court, proves nothing to the contrary. In fact, so far as the neutral is concerned, there is nothing to stay. The judgment was executed, out upon the high seas, by way of anticipation, even before the suit was filed; and the belligerent then got and still holds the property. In view of the circumstances surrounding such anomalous proceedings, the belligerent ought in no event to be put in a position where he can circumvent the neutral's getting a fair trial, and the court's giving him the most direct and effectual relief in its power.

The "action in damages" is the negation of all these propositions. It neutralizes the restrictions on the belligerent's power to sell, destroy or confiscate the vessels and goods of peaceful commerce. It denies the power of the International Court to grant direct and specific relief. It changes the nature of the action on appeal and compels the neutral to meet new issues for the first time. It disregards the suspensory effect of an appeal to the International Court, and leaves the captor a free hand to confiscate transports and stores before the same have been condemned or even brought in for adjudication. It cuts off all relations between the International Court and the national supreme authority in matters of prize, and leaves the execution of the appellate court's mandate to the commander-in-chief of the belligerent's forces, who in turn must obtain the sanction of the legislative department of the government.

⁵³ Cf. *The Peterhoff* (1865), Blatchford's Prize Cases, 620, 19 Federal Cases No. 11,025:

"The prize remains in the hands of the captor lawfully sequestered, under a species of trusteeship, awaiting a trial in the courts of the nation seizing it. While undergoing the processes of law necessary to ascertain its character, it is exempt from all power of the captors other than that of safe-keeping for the purposes of trial of determining its culpability."

It denies the neutral's primary right of property in every case, yet in the same breath offers compensation "if the capture is considered illegal." Nor does it offer to bring the money into court for the property of neutrals sold, destroyed, or confiscated. The only relief it offers is a judgment, to put it as strongly as possible, against a nation in the throes of war, that is worth no more on the dollar than the public securities thereof at the time, to put it as favorably as possible. The victim is made a creditor of the government that has despoiled him. What if that government is Honduras, China, Cuba, Mexico, Persia, Paraguay, Santo Domingo, or Venezuela,⁵⁴ all of which may become parties to the Prize Convention? There is no question that the neutral would in every case prefer a decree for the release of the specific property taken from him, which is easy to perform and does not admit of postponement and delays on one pretext or another, or because the national treasury is depleted or more pressing claims are made on the resources of the country, as would a judgment for damages. The danger to peaceful commerce is heightened by the fact that not one of the nations mentioned has acceded to the Declaration of Paris. If the seizures made by their duly commissioned privateers may be confiscated by the government even before adjudication, or sold and the prize moneys distributed among avaricious captors before a hearing can be had in an impartial court; and the despoiled neutral is then left no recourse but a long litigation that may result at best in a judgment of questionable value, it is easy to see that unarmed commerce will remain the prey of war in an undiminished degree, and the convention, which was drawn in the interest of neutrals as a weapon of defence better than arms, is emasculated, and made in effect to legalize that which it was designed to prohibit.

The views expressed in this article are taken from the standpoint of the interests, in actual war, of peaceful commerce, which was likewise the viewpoint of the framers of the convention. As to the possible advantages and disadvantages to the respective belligerents under the one system or the other, we venture only the opinion that in time of war every restraint is resisted almost to the breaking point, and every license is

⁵⁴ Or any other nation signatory. These are named only because their public credit has fluctuated notoriously even in time of peace.

War may lay even the greatest low.

exploited to the last degree of plausibility. The American system and the international system are different; and Article 2 of the *protocole additionnel* admittedly embodies only a part of the remedies of Article 8 of the convention. If this difference is crystallized into law by the ratification of the protocol, any advantages or disadvantages of the dual system will be legalized and no blame can attach to any belligerent for exploiting them.

There is no doubt that the proposal of the United States, as reduced to form in the protocol, did not originate in *amour propre*, for the United States did not lose sight of the significance of the King of Great Britain in Council, and of the Emperor of Germany, whose word in prize matters in his dominions is little short of law, submitting their acts to review by a foreign court. It originated in an over-anxious desire to accept the convention and to be bound beyond all cavil.⁵⁵ But the frequency with which our "constitutional difficulties" block the ratification of treaties *as an afterthought*,⁵⁶ has undoubtedly created in Europe an undercurrent of dissatisfaction, if not of suspicion and resentment.⁵⁷ Nations hesitated to ratify the Prize Court Convention before they knew what law the court would administer — will they not again hesitate before they know what remedy the court will administer? Is there no other way of removing our internal difficulties but by requiring the world to accommodate itself to them?

GEORGE C. BUTTE.

⁵⁵ No treaty in our history was ever declared unconstitutional. Cf. Butler, Chas. H., *The Treaty Making Power of the United States*, § 454.

⁵⁶ When the convention was under discussion, July 11, 1907, our delegate, Mr. Choate, incidentally remarked, "As to our firm conviction in favor of the appeals being taken only from our own Supreme Court," etc. Vol. II, *Actes et Documents de la Seconde Conférence de la Paix*, p. 811. He was clearly unaware then of any constitutional difficulty in this form of appeal.

⁵⁷ Cf. von Martitz, Ferdinand, in "Die neuesten Vorgänge in der Bewegung für internationale allgemeine Schiedsabkommen" in *Internationale Monatschrift*, Nov., 1911, pp. 149-150.

"Die auffallende Ratifikationsweigerung begegnete lebhafter Missbilligung der europäischen Regierungen, die an dem Tenor ihrer Verträge gar keine Bedenken gefunden hatten. Dass das von den Amerikanern mit Enthusiasmus propagierte Vertragssystem an einer internen Frage ihres Staatsrechts * * * scheitern sollte war seltsam genug. Als es im Jahre 1907 zur zweiten Haager Konferenz kam, spielte in den Debatten über den Weltschiedsvertrag auch dieser Punkt eine erhebliche Rolle. Er bildete mit den anderen einen Ablehnungsgrund."

THE FRENCH SPOLIATION CLAIMS

PART III

TREATY OF 1803 WITH FRANCE

The jurisdictional act of 1885 provides ¹

That the provisions of this act shall not extend to such claims as were embraced in the convention between the United States and the French Republic concluded on the 30th day of April, 1800.

The question has sometimes been asked, whether these French spoliation claims were not pressed by our government against France after the conclusion of the treaty of September 30, 1800, which has always been relied upon as surrendering the rights of these claimants to France for a valuable consideration.

We have seen ² that Napoleon in ratifying the convention of 1800, did so with the proviso "that by this retrenchment the two states renounce the respective pretensions, which are the object of the said article," that is, "the indemnities mutually due, or claimed." The claims here referred to were, on our side, for seizure of our ships and cargoes.

The question asked is whether we accepted Napoleon's construction of the abrogation of the second article of the original treaty of 1800, as extinguishing our claim to indemnities for French spoliations.

No claim for ships or cargoes captured by the French prior to September 30, 1800, was ever urged by our government upon France, subsequent to the ratification of the treaty of that date, July 31, 1801.

¹ 23 Statutes at Large, 283; Opinions, 1912, p. 7.

The volume referred to throughout this article as Opinions, 1912, is as follows:

"Opinions of the Court of Claims in French Spoliation Cases, 1886 to 1911, Court of Claims Reports, Volumes 21 to 46 and Digest of Opinions, printed for Committee on War Claims, House of Representatives, Washington, 1912."

² AMERICAN JOURNAL OF INTERNATIONAL LAW, April, 1912, p. 309.

This point is so clearly established in Senator Sumner's great report of 1864, that a portion of it is here quoted:

The convention of 1800, which sacrificed the claim for "torts," kept alive certain pending claims for "debts," in the following words:

"Art. V. The debts contracted by one of the two nations with individuals of the other, or by the individuals of one with the individuals of the other, shall be paid, or the payment may be prosecuted in the same manner as if there had been no misunderstanding between the two States. But this clause shall not extend to indemnities claimed on account of captures or confiscation." (Stat. L., Vol. 8, p. 180.)

It will be observed how carefully the claims for spoliation were excluded from the benefit of this provision, which is limited positively to "debts." Though apparently plain, the French Government found difficulties in the way of its execution. Vexatious delays were interposed, and "debts" were treated little better than "claims," so that, our minister at Paris, Robert R. Livingston, felt obliged to write to the French Government, under date of March 25, 1802:

"The fifth article of the treaty says, expressly, they shall be paid; but justice and good faith say it, independent of the treaty. Yet they remain unsatisfied; nor is the most distant hope as yet afforded them of when or how they will be paid." (French Spoliations, Ex. Doc., 1826, p. 714.)

Such was the spirit of other correspondence. At last, by one and the same transaction, Louisiana was purchased, and these "debts" were provided for. The plenipotentiaries of the United States, Mr. Livingston and Mr. Monroe — the latter sent to France a second time — undertook to pay eighty millions of francs for the purchase, of which sixty millions were for France and the remaining twenty millions to be applied to the payment of the "debts" secured by the convention of 1800; and these terms were embodied in a treaty and two associate conventions of the same date.

The treaty contained the terms of cession. One of the conventions regulated the terms of purchase, and the other provided that "the debts due by France to citizens of the United States, contracted before 30th September, 1800, shall be paid" according to certain regulations. It will be observed that these words descriptive of the "debts" are not unlike those employed in the fifth article of the convention of 30th September, 1800.

The new convention regulating the payment of the "debts" begins with a preamble, setting forth the desires of the President of the United States and the First Consul, in compliance with the second and fifth articles of the convention of 30th September, 1800, to secure the payment of the sum due by France to the citizens of the United States. From the association of these two articles some have hastily inferred that the purpose was to revive the "claims" abandoned in the famous

second article. But such a revival instead of being "in compliance" with that article, or, according to the corresponding French words of the convention, on execution of that article, would be in direct contradiction of it. The allusion to the second article of the convention of 1800 is obviously in order to carry into the Louisiana convention the original exclusion of the spoliation "claims." If any doubt could arise on the allusion to the second article, taken by itself, it would disappear when we consider that the fifth article is both inclusive and exclusive. It includes "debts contracted," which are to be paid, and it excludes "indemnities claimed on account of captures or confiscation," which are not to be paid. Thus the language of the preamble is justified, and the convention is in compliance with both the second and the fifth articles of the original convention.

But if we examine the Louisiana convention carefully, we shall find that "debts" alone are provided for. The first article, as we have already seen, declares "the debts due by France to the citizens of the United States, contracted before the 30th September, shall be paid according to the following regulations." The second article describes "the debts provided for in the preceding article" as comprised in a conjectural note. The third article declares how "the said debts shall be discharged by the United States." The fourth article more specifically defines the debts as follows: "It is hereby expressly agreed that the preceding articles shall comprehend no debts but such as are due to citizens of the United States who have been and are yet creditors of France for supplies, for embargoes and prizes made at sea, in which the appeal has been properly lodged within the time mentioned in the convention of 30th September, 1800." The fifth article explains further the prizes intended in the last article, as follows:

"The preceding shall apply only, first, to captures of which the council of prizes shall have ordered restitution, it being well understood that the claimant can not have recourse to the Government of the United States otherwise than he might have had to the Government of the French Republic, and only in case of the insufficiency of the captors; second, the debts mentioned in the said fifth article of the convention of 1800, the payment of which has been heretofore claimed of the actual Government of France, and for which creditors have a right to the protection of the United States. The said fifth article does not comprehend prizes whose condemnation has been or shall be confirmed."

Under the first head, the class of captures is here defined. It was those only where the council of prizes had ordered restitution, being captures not warranted by the laws of France. Such cases were included among "debts" because the decree of the council of prizes ordering restitution instantly created, on the part of the owner, a claim on the captor for the property or its value; and where the captor was "insufficient," the government assumed the debt. And this is the only class of captures provided for in the Louisiana convention. Under the sec-

ond head is specified "the debts mentioned in the fifth article," with an express declaration that it "does not comprehend prizes whose condemnation has been or shall be confirmed." Thus in every article and at every stage the spoliation claims were excluded from the benefit of the Louisiana convention.³

Mr. Madison as Secretary of State, writing to Mr. Livingston, American Minister at Paris, under date of December 18, 1801, says in regard to the declaratory clause affixed by Napoleon to the second article: "I am authorized to say that the President does not regard the declaratory clause as more than a legitimate inference from the rejection by the Senate of the second article."⁴

Following his instructions, Mr. Livingston (January 20, 1802) wrote the French Minister of Foreign Relations, urging him, in one sentence after another, in the strongest possible manner, to settle claims for condemnations of vessels and cargoes "where the capture was made after the 30th September, 1800."⁵

The repeated reference to this date, September 30, 1800, as the day from which the French Government was liable "for illegal captures," would alone afford complete evidence that we had abandoned as against France, all claims for indemnities for captures prior to that date. We are not, however, left to inference on this point, for Mr. Livingston, in a further letter of April 17, 1802, to the French Minister of Foreign Relations, said:

I am sorry, sir, that we should still continue to think differently on the subject of the indemnities. The fifth article appears to me to go much farther than your construction of it is willing to admit. It expressly stipulates that all debts due by either Government to the individuals of the other, *shall be paid*. But as this would also have included the indemnities for captures and condemnations previously made; and it was the intention of the contracting parties, by the second article, to preclude this payment as depending on a future negotiation, it was necessary to except from this promise of payment *all* that made the subject of the second article. The exception, therefore, must be considered as a complete explanation of the extent of the word "indemnities" in that article; and the whole of the 5th article taken together, amounts to an express stipulation to pay every debt due to individuals,

³ S. Rep. No. 41, 38th Cong., 1st Sess., reprinted in *Compilation of Reports of Committee on Foreign Relations, United States Senate, 1789-1901*, Vol. 1, pp. 307-309.

⁴ S. Doc. No. 102, 19th Cong., 1st Sess., p. 703.

⁵ *Ibid.*, pp. 704-706.

except such as they might claim for indemnities for captures and condemnations, and must have been so construed had the 2d article continued in the treaty. On its being erased, the 5th article stands alone as a promise to pay, with the single exception of indemnities for captures and condemnations. It will, sir, be well recollected by the distinguished characters who had the management of the negotiation, that the payment for illegal captures, with damages and indemnities, was demanded on one side, and the renewal of the treaty of 1778, on the other; that they were considered as of equivalent value, and that they only formed the subject of the 2d article; and that, as to the payment of indemnities for embargoes, in consequence of the cargoes being put in requisition, or with a view to any other political measure which carried with it nothing hostile to the United States, no controversy ever arose between the Plenipotentiaries of the two nations.

I am ready, sir, on the other hand, to admit the justice of your remark, so far as relates to indemnities for captures and condemnations which had been made previous to the signature of the treaty; and that, as to such parts of my note on the subject of prizes as relate to this object, I acknowledge that my demand cannot be supported by the convention.⁶

Here is a definite admission by our minister in a formal communication to the French Minister of Foreign Relations, that we have no claim against the French Government for indemnity for captures and condemnations made before the signature of the treaty of September 30, 1800. As we have seen, the convention of 1803 for the purchase of Louisiana was based upon this view, and excluded claims for spoliations committed by the French prior to September 30, 1800.

TREATY OF 1819 WITH SPAIN

The jurisdictional act of 1885⁷ also excludes

Such claims growing out of the acts of France as were allowed and paid, in whole or in part, under the provisions of the treaty between the United States and Spain concluded on the 22d day of February, 1819.

A literal reading of this provision would exclude only such claims "as were *allowed and paid* in whole or in part" under the treaty named. Yet, as the treaty and the Act of Congress constituting a commission thereunder acknowledged the liability of the Spanish Government for "all claims on account of prizes made by French privateers and condemned by French Consuls within the territory and jurisdiction of

⁶ *Ibid.*, p. 717.

⁷ 23 Statutes at Large, 283; Opinions, 1912, p. 7.

Spain," the practical construction placed upon this provision by the Court of Claims has been to exclude from consideration all claims where the condemnation was made in Spanish territory, even though the capture was by a French privateer, and the act of condemnation was by a French tribunal, provided such tribunal sat within Spanish territory.⁸

This rule of exclusion, however, does not extend to cases where the tribunal pronouncing the condemnation sat in French territory. In such a case France and not Spain was the responsible nation, and a claim arising under such circumstances, is a well founded French spoliation claim.⁹

Nor does the exclusion extend to cases where a vessel, acting under authority of the French Government, seized American property on the high seas and took her into a Spanish port and there appropriated her to the use of the captors without any judicial condemnation.

TREATY OF 1831 WITH FRANCE

The jurisdictional act of 1885 further excludes

Such claims as were allowed, in whole or in part, under the provisions of the treaty between the United States and France concluded on the 4th day of July, 1831.

By the treaty of 1831, the French Government engaged to pay 25,000,000 francs to the United States, and the United States agreed to distribute it, according to its own rules, among those entitled to it.¹⁰ This treaty, interpreted in the light of those which preceded it, provided only for the settlement of such claims against France as were valid at its date. Any idea that claims arising prior to the ratification made by the treaty of September 30, 1800, were included within it, is conclusively negated by the action of the commissioners under the treaty. This is tersely summarized by Mr. Sumner in his Report of 1864:¹¹

⁸ *Ship Hope*, 27 C. Cls. 122, Opinions, 1912, p. 203; *Ship Apollo*, 35 C. Cls. 411, Opinions, 1912, p. 277; *Public Treaties*, 1875, p. 715.

⁹ *Ship Star*, 35 C. Cls. 387, Opinions, 1912, p. 266; *Schooner Two Cousins*, 42 C. Cls. 436, Opinions, 1912, p. 521.

¹⁰ *Public Treaties of the United States*, 1875, p. 245.

¹¹ *Compilation of Reports of Committee on Foreign Relations, United States Senate, 1789-1901*, p. 310.

Our own commissioners, sitting at Washington, reported to the Secretary of State, under date of December 30, 1835, that they had required every person seeking to entitle himself under the convention to show that his "claim remained unimpaired and in full force against France at the date of the convention of 1831." (H. Ex. Doc. 117, Twenty-fourth Congress, first session, p. 4.) But the claims now in question did not come within this category. Clearly, they were not "unimpaired and in full force against France."

All this is apparent on the face; but it was demonstrated by the action of the commissioners. The experiment was made with regard to captures prior to the convention of 1800, and no less than 105 cases were submitted to the board. But they were all rejected. The first rejections, in point of time, were July 11, 1833, in two different cases, when we have the following entry:

"*Caroline*, captured February 10, 1798, rejected; the vessel having been captured before the 30th of September, 1800." A similar entry was made on the same day in the case of the *Orlando*, captured March 1, 1800. In the larger part of the cases that followed the entry was simply "rejected," without any addition. But it is obvious that the principle was decided in those two earliest cases.

The statutory rule of exclusion of cases covered by the treaties of 1803, 1819 and 1831 was very carefully considered by the Court of Claims in a number of cases wherein the history and purpose of these treaties was set forth substantially to the effect summarized above.¹²

SALVAGE

In some cases in which vessels and their cargoes were captured by French cruisers or privateers, the prize vessel was recaptured by a British vessel and compelled to pay salvage as a condition of release. The ordinary rule of admiralty courts is, that when a neutral vessel is captured by one belligerent and recaptured by the other, she is entitled to be set free without salvage for the reason that the capturing belligerent would have to release her anyhow, and therefore the recapturing belligerent has conferred no service of value upon the neutral by recapturing her.

The violation of neutral rights by the French was, however, so notorious, that the English admiralty courts changed their rule in this respect during these hostilities, and compelled neutral vessels to pay salvage

¹² Schooner *Sally*, 21 C. Cls. 340, Opinions, 1912, pp. 25-62; Schooner *Two Cousins*, 42 C. Cls. 446, Opinions, 1912, p. 521.

to their British recaptors on the ground that the French courts would probably have condemned them, even though innocent, and that therefore they received substantial service by the recapture.

At an early day in the history of the prosecution of these claims in the Court of Claims, that court recognized the correctness of this changed practice of the English admiralty court, and, as the necessity for paying salvage arose from the illegal capture by the French, allowed claims for salvage where paid under sentence of the English admiralty court.¹³

In practice, the beneficial effect of this decision on the rights of claimants has been weakened by recent decisions, holding on technical grounds of evidence peculiar to the common law, that the record of the case before the English admiralty court is inadmissible evidence as against France, who was not a party to the proceeding, and therefore against the United States which is substituted for the liability of France.¹⁴

These decisions create considerable practical difficulty in the way of maintaining a claim for salvage, by excluding from consideration the principal evidence upon which such a claim must, if at all, be sustained.

EVIDENCE

The Act of 1885, conferring jurisdiction of these cases on the Court of Claims, provides:

That in the course of their proceedings they shall receive all suitable testimony on oath or affirmation, and all other proper evidence, historic and documentary, concerning the same.

Also:

That it shall be the duty of the Secretary of State to procure, as soon as possible after the passage of this act, through the American minister at Paris or otherwise, all such evidence and documents relating to the claims above mentioned as can be obtained from abroad; which, together with the like evidence and documents on file in the Department of State, or which may be filed in the Department, may be used before the court by the claimants interested therein, or by the United States, but the same shall not be removed from the files of the court.

¹³ Schooner *John*, 22 C. Cls. 408, 457-459, Opinions, 1912, p. 99; Schooner *Nancy*, 37 C. Cls. 401, Opinions, 1912, 388; Schooner *Two Cousins*, 42 C. Cls. 436, Opinions, 1912, p. 521.

¹⁴ Ship *Hiram*, 41 C. Cls. 12, Opinions, 1912, p. 491; Brig *Philanthropist*, 47 C. Cls. Opinions, 1912, 582.

In the case of the Schooner *Delight*,¹⁵ the provisions of the third section of the jurisdictional act of January 20, 1885, were held to "make a material change in the law of evidence." Accordingly, the court refused to strike out evidence claimed to be inadmissible, although it was "a motion which would be immediately granted were the case within the ordinary jurisdiction of the court." And, consistently with this decision, it was said in the case of the Ship *Ganges*, Captain Charles Langford,¹⁶

If the common-law rules of evidence were applied with technical strictness it would not be possible to investigate these claims in the spirit contemplated by the jurisdictional statute or to accomplish the result intended by the Congress.

Later decisions, however, materially qualify the rule announced in the earlier cases. In the Ship *Parkman*,¹⁷ it was in effect held that the Act had made no change in common-law rules of evidence:

"Proper evidence, historic and documentary, concerning the same," does not establish a new principle in the law of evidence, as the word "proper" qualifying "historic and documentary" subjects such evidence to the test of the wise rules adopted by that system of law which governs the courts of this country.

In the Brig *Juno*,¹⁸ and Brig *Maria*,¹⁹ the court excluded sworn statements made, respectively, twenty-two and forty years after the occurrence of the losses, though by persons having personal knowledge thereof, as "not being contemporaneous."

In view of the direction of the jurisdictional act,²⁰ quoted above, requiring the court to "receive all suitable testimony on oath or affirmation," this seems a stringent ruling. The common law nowhere requires that testimony shall be, to use the term of the Court of Claims, "contemporaneous," that is, having a certain nearness of time to the occurrence of the transaction. The testimony of a witness to his personal knowledge is accepted by the law with just as much readiness if given twenty or forty years after the occurrence, as if given immediately afterwards.

¹⁵ 21 C. Cls. 434, 442, 443, Opinions, 1912, p. 72.

¹⁶ 25 C. Cls. 110, 114, Opinions, 1912, pp. 182, 255.

¹⁷ 35 C. Cls. 406, 408, Opinions, 1912, p. 274.

¹⁸ 36 C. Cls. 39, 41 C. Cls. 106, Opinions, 1912, pp. 303, 497.

¹⁹ 39 C. Cls. 39, Opinions, 1912, p. 439.

²⁰ Section 3, 23 Statutes at Large, 283, Opinions, 1912, p. 7.

The latest ruling is in the case of the Schooner *Nantasket*,²¹ where the court, after quoting the terms of the jurisdictional statute, says:

Under this command of the statute the court has uniformly admitted as evidence the subsequent protests (made nearly contemporaneous with the transaction) for whatever they may be worth as a part of the *res gestæ* in connection with the other proof and circumstances in the case leading up to a decree of condemnation.

Generally speaking, protests can have but little value as against the recitals of a decree of a prize court where the decree shows a valid ground of condemnation. Where protests are delayed beyond a reasonable time, it would seem that they should be disregarded like all other subsequent affidavits in such cases. The burden of the proof is with the claimant to establish illegality. Legally competent evidence is necessary to do it.

As we have just seen, the court has also excluded all testimony taken before English admiralty courts in salvage cases. It would seem therefore that, considering the age of these claims, the court has applied common-law rules of exclusion with remarkable stringency. No doubt can exist that even with the most favorable rules of evidence in force, many just claims would at this late date be impossible to establish, owing to the destruction or loss of evidence. Much more must it be the case when the rules have been so rigidly applied as to exclude a large proportion of the only remaining evidence of the transactions.

IDENTITY AND NEXT OF KIN

In the previous article²² it appeared that the Court of Claims discovered in the course of its investigations that these claims had been tenaciously held in the families of the original losers. To insure that after the lapse of a century the mere taking out of administration on the estate of a person of a certain name should not in any case result in the proceeds of the claim going into the hands of strangers, the Court of Claims early adopted the practice of requiring the identity of the parties to be established by evidence other than the mere grant of administration.

The rule adopted is thus stated:²³

²¹ 46 C. Cls. 291, 297, Opinions, 1912, pp. 443, 577.

²² AMERICAN JOURNAL OF INTERNATIONAL LAW, April, 1912, p. 379.

²³ Ship *Betsey*, 23 C. Cls. 277, 278, Opinions, 1912, p. 158.

The French Spoliation Act, 1885 (Sec. 3), requires this court to "examine and determine" "validity," "amount" and "present ownership." Present ownership is not established by the mere production of letters of administration of a person having the same name taken out ninety years after the event. The administrator must prove that the deceased whose estate he administered in 1886 was the person who suffered loss in 1796. The nature and sufficiency of the proof will depend on time, place, and circumstances, but must be sufficient to satisfy a reasonable mind that the decedent was the veritable claimant who suffered the loss complained of.

The proof thus required is under the practice uniformly required before an administrator can obtain an allowance of his claim.

Even after the amount is appropriated by Congress, he is still unable to obtain it without the proof required by the following provision, which has in substance appeared in all the appropriation acts made for the payment of these claims: ²⁴

The awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy, and the awards in the cases of individual claimants shall not be paid until the Court of Claims shall certify to the Secretary of the Treasury that the personal representatives on whose behalf the award is made represent the next of kin, and the courts which granted the administrations, respectively, shall have certified that the legal representatives have given adequate security for the legal disbursements of the awards.

The court requires testimony to be taken to establish the fact thus made essential, and has ruled thereon as follows: ²⁵

The record of the probate court granting administration is not sufficient to establish the fact required by the statute, and must be supplemented by a deposition or depositions, at the taking of which the United States shall have an opportunity to cross-examine the witness or witnesses.

The intent of Congress in the enactment of this provision, that the fund shall in all cases ultimately reach the next of kin of the original losers, is explained in the case of the Ship *Eliza*: ²⁶

Congress wished to protect the flesh and blood of the original sufferer from any invasion or sacrifice of right.

The certificate required by the statute as a prerequisite to the pay-

²⁴ 33 Statutes at Large, 780.

²⁵ Ship *Joanna*, 26 C. Cls. 253, 254, Opinions, 1912, p. 189.

²⁶ 28 C. Cls. 480, 482, Opinions, 1912, p. 239.

ment of an award at the Treasury into the hands of a personal representative does not determine the rights of beneficiaries; nor whether legatees can take to the exclusion of next of kin or next of kin to the exclusion of legatees; but merely that there are next of kin in existence and that the administrator who receives the money was appointed on the application, or with the knowledge or acquiescence, of the next of kin, and so far represents them that they will be able in the proper jurisdiction to enforce their rights against the fund in his hands. The purpose of the statute was to prevent the payment of money to an administrator who in fact represents nobody, or who may represent only creditors or assignees in bankruptcy.

APPROPRIATIONS AND PAYMENTS

Four appropriations have now been made for the payment of the awards of the Court of Claims. These appropriations are as follows:

March 3, 1891, 26 Stat. L. 897 (51st Cong.)	\$1,304,095.37
March 3, 1899, 30 Stat. L. 1161 (56th Cong.)	1,055,473.04
May 27, 1902, 32 Stat. L. 207 (57th Cong.)	798,631.27
Feb. 24, 1905, 33 Stat. L. 743 (58th Cong.)	752,660.93
Total	<hr/> \$3,910,860.61

The first of these acts, that of 1891, was the regular deficiency appropriation act of that year, in which these spoliation awards were inserted as an item. The other three, those of 1899, 1902 and 1905, were what are known as omnibus claims acts, providing for the payment of a number of claims considered and allowed by the Court of Claims, under several statutes others than those under which the court enters final judgments.

No bill providing for the payment of awards of the Court of Claims under the French Spoliation Act, or under any other Act, other than those in which its award takes the form of a final judgment, has been passed since 1905.

The awards made by the Court of Claims since that year have been accumulating until there are now pending before Congress allowances amounting to \$945,157.51. This figure includes only awards of a class which Congress has, by the four appropriation acts already made, recognized as entitled to payment. It excludes awards in favor of in-

surance companies, which, although made by the Court of Claims upon well-known principles of subrogation, have been expressly excluded by Congress from all benefit of appropriation and which, therefore, cannot be paid unless Congress shall determine upon a change of public policy in this respect.

REASONS FOR INACTION OF CONGRESS

By an examination of the dates of the appropriation acts above, it will be seen that the first was passed in 1891, the second after an interval of eight years, in 1899, the third after an interval of three years, in 1902, and the fourth and last, up to the present time, after another interval of three years, in 1905. The question will naturally be asked, how does it come that no appropriation has been made for seven years, although, as just stated, there are over \$900,000 of claims now waiting to be provided for. The answer to this question must be in general terms, the same that was given in the opening of the first article of this series,²⁷ for the initial neglect of Congress to provide for the adjudication of the claims. It is simply the traditional dilatoriness of the government in dealing with matters of private right. Let us look in some detail at the proceedings of Congress with reference to these claims in the 59th, 60th, 61st and 62nd (the present) Congresses. It will form an interesting illustration of the treatment received by creditors of the government at the hands of Congress, even after running the gauntlet of a tribunal so stringent in its rulings as the Court of Claims.

59TH CONGRESS

The Act of 1905 was almost immediately followed by reports of a large number of additional awards by the Court of Claims.

The Senate has a Committee on Claims with jurisdiction over the subject of all claims against the government.

The House of Representatives has a Committee on War Claims, whose jurisdiction is sufficiently indicated by its title, leaving to the Committee on Claims the subject of all remaining claims.

The union of war claims with those of a miscellaneous character in the

²⁷ AMERICAN JOURNAL OF INTERNATIONAL LAW, April, 1912, p. 359.

same bill has thus led, in practice, to some embarrassment, owing to the fact that no committee of the House has complete jurisdiction over the entire subject.

May 8, 1906, the House Committee on War Claims, reported a bill containing appropriations for the payment of a number of claims arising during the Civil War as well as of French spoliation claims to the amount of \$320,077.26.²⁸ In so reporting, the committee made the following interesting résumé of the practice in appropriating for these cases:²⁹

For a number of years last past, the usual course of proceeding in appropriating for these cases has been as follows:

A bill was reported from this committee covering the payment of claims for stores and supplies taken during the civil war, as reported by the Court of Claims under the act of March 3, 1883 (22 Stat. L., 485), commonly known as the Bowman Act. In this shape the bill has passed the House. In the Senate the claims for French spoliations have always been made an amendment to the bill so passed by the House. When the bill has come back from the Senate, it has, of course, been referred to this committee as the committee which originally reported it. In that way, this committee has, in each instance, acquired jurisdiction of these claims. Such has been the history of the three bills known as the omnibus claims bills approved, respectively, March 3, 1899 (30 Stat. L., 1161), May 27, 1902 (32 Stat. L., 207), and February 24, 1905 (33 Stat. L., 743).

As Congress is now thoroughly committed to the payment of these claims, subject to the limitations and restrictions contained in the jurisdictional act, as well as in the several appropriation acts for their payment which have been referred to, it seems a useless formality to pass this bill through the House containing only claims under the Bowman Act, when it is certain that the bill when it passes the Senate will also contain the French spoliation claims. The practice of the House has clearly given your committee jurisdiction of these claims in past Congresses. Under these circumstances your committee, in reporting this bill for the payment of claims arising out of the civil war under the Bowman Act, has included in that bill the French spoliations, which have always in past Congresses ultimately become a part of the bill. The circumstances out of which these claims arose and the arguments supporting them were fully stated in the reports of the Senate committee on the bill which became the omnibus claims act of 1902, being Senate Report No. 493 (57th Cong., 1st Sess., pp. 50 to 53, and 147 to 212), and need not here be repeated. The Court of Claims in numerous opinions, many of which are mentioned in the report referred to, has held

²⁸ House Report No. 3925, 59th Cong., 1st Sess., p. 5.

²⁹ *Ibid.*, pp. 3-5.

that these claims as a class are clearly valid obligations of the Government.

Independent of the established practice of the House in past Congresses, these claims clearly appear to be within the jurisdiction of this committee. Actual war existed between France and England at the time the depredations which form the subject-matter of these claims were committed by the French. These hostilities were attributed directly to the bitterness engendered by the assistance rendered by the French to the United States during the war of the Revolution. In 1778, only two years after our Declaration of Independence and at the height of the Revolutionary war, France made a treaty of alliance with us guaranteeing the sovereignty and independence, absolute and unlimited, of the United States, while the United States guaranteed to France "the present possessions of the Crown of France in America, as well as those which it may acquire by the future treaty of peace." France extended to us most indispensable assistance, both military and financial, in securing our independence. She afterwards charged during her wars with England, which ensued upon the French revolution, that we neglected to carry out our obligations of guaranty of her American possessions.

It was the state of feeling arising out of this charge which gave rise to these depredations which the French men-of-war and privateers committed on our commerce. The aggressions of the French would have culminated in an actual declaration of war from which at times we seemed not far distant but for the fact that the financial and other resources of the United States did not at that time permit us to engage in war with a powerful nation like France, and also because the matter was ultimately settled by diplomatic methods without recourse to war. Indirectly, therefore, these claims are traceable to our own Revolutionary war, and they also arose directly out of the war between France and England. In many senses, therefore, they are "war claims."

These cases were referred en bloc to the Court of Claims by the act above cited. That tribunal is empowered to render a finding of fact and likewise conclusions of law. It does not, as under its general jurisdiction, render final judgment. After said findings of fact and conclusions of law the cases are reported to Congress for an appropriation. In this last the French spoliation claims are similar to the claims under the Bowman Act.

The time for filing claims of this character has long since expired under limitations contained in the act of January 20, 1885. Under this act there were filed 5,569 principal cases relating to 3,399 vessels.

Up to the latest report there remained upon the docket of the Court of Claims undisposed of 3,605 cases.

It may equally be said of the French spoliation claims, as of the Bowman Act cases, that they are rapidly being finally disposed of and that the future appropriations required to meet findings of the Court of Claims will show a steady annual decrease. Naturally, the attorneys

interested in the prosecution of this class of cases chose those cases which presented the least difficulties and in which the proof was most conclusive to first press to issue. The fact that all important legal questions as to the validity of the seizures have been passed upon by the Court and that in almost all the pending cases nothing remains to be done except to make necessary proof and that the cases both as to number and amount are annually decreasing, proves it will be but a short time until the end will be reached.

The last annual report of the Assistant Attorney-General for the fiscal year ending June 30, 1905, showed that motions had been made to dismiss for want of prosecution in 391 cases relating to 319 vessels. Since that time this number has been largely augmented by similar motions. Your committee are informed that a very large portion of the now pending cases will in due course be dismissed because of the inability of the claimants to make the required proof.

The bill, however, as so reported was never reached for action by either House in the 59th Congress, which expired by limitation March 3, 1907.

60TH CONGRESS

In view of the failure of the House to act on this bill in the 59th Congress, the War Claims Committee in the next or 60th Congress, decided to return to the older practice outlined in the above quoted report. It therefore reported a bill only for the allowance of Civil War claims. This bill passed the House of Representatives February 7, 1908. It went to the Senate and was there reported back by the Committee on Claims of the Senate March 16, 1908, with an amendment including all claims allowed by the Court of Claims up to that time for French spoliations of the same character as those previously appropriated, and then amounting to \$714,631.92.

The bill so reported passed the Senate January 29, 1909, containing provisions for the payment of all these French spoliation claims. In view of the approaching end of the session, March 3, 1909, this was too late for it to receive any further consideration by the House, and thus the bill failed to become finally acted upon in that Congress.

61ST CONGRESS

The 61st Congress saw the introduction of still a new mode of procedure. This time the omnibus claims bill originated in the Senate.

By Senate Report No. 603, of Mr. Burnham, from the Committee on Claims, that committee, April 28, 1910, reported a bill for the payment of a number of classes of claims allowed by the Court of Claims, saying:

The committee has allowed all valid French spoliation claims certified to Congress by the Court of Claims under the provisions of the Act of January 20, 1885, since the omnibus claims bill of the Fifty-eighth Congress was reported, except assigned claims and the claims of incorporated insurance companies.

By the terms of the act above referred to, no claims filed subsequent to January 20, 1887, can be entertained by the court. The committee is informed upon good authority that a very large proportion of such as are now pending in the court will be dismissed for want of proof. Only one valid claim has been certified since January 1, 1910.

The amount of French spoliation claims included in this bill was \$842,688.53.

No action having been taken upon it at the session at which it was reported, President Taft in his annual message of December 6, 1910, thus pointedly called the attention of Congress to its delay in making provision for payment:

I invite the attention of Congress to the great number of claims which, at the instance of Congress, have been considered by the Court of Claims and decided to be valid claims against the Government. The delay that occurs in the payment of the money due under the claims injures the reputation of the Government as an honest debtor, and I earnestly recommend that those claims which come to Congress with the judgment and approval of the Court of Claims should be promptly paid.

Just a fortnight after the date of this message the Senate passed the bill (December 20, 1910). The House laid the Senate bill on the table, and sent its own omnibus claims bill to the Senate. This bill being reported by the House Committee on War Claims, contained appropriations only for the payment of that class of cases. It was referred to the Senate Committee on Claims, and there remained without being reported until that Congress expired by constitutional limitation, March 3, 1911.

62ND CONGRESS

The recommendation made to the last Congress having failed of effect, President Taft, at the opening of the first regular session of the present

Congress, the 62nd, thus returned to the subject in his message of December 21, 1911:

In my last message, I recommended to Congress that it authorize the payment of the findings or judgments of the Court of Claims in the matter of the French spoliation cases. There has been no appropriation to pay these judgments since 1905. The findings and awards were obtained after a very bitter fight, the Government succeeding in about 75 per cent of the cases. The amount of the awards ought, as a matter of good faith on the part of the Government, to be paid.

The failure of bills of this kind to become laws in the preceding Congress when reported in a manner different from that established by legislative precedent, apparently determined both Houses to return to the old plan. In accordance therewith, an omnibus claims bill was reported to the House by the Committee on War Claims January 31, 1912³⁰ containing nothing but war claims, strictly so called. It passed the House February 17, 1912.

After three months' consideration by the Senate Committee on Claims, it was reported May 20, 1912.³¹ In that report the committee stated:

Your committee having considered the proposed amendment, presented by the Senator from Massachusetts (Mr. Lodge), to incorporate into the bill what are known as French spoliation claims, decided that it is inexpedient to do so. There is an irreconcilable difference of opinion among the members of the committee in regard to the merit of the spoliation claims, and it is their opinion that they should be considered separately upon their merits. A summary of the findings made by the Court of Claims in each case of French spoliation included in the amendment proposed by Mr. Lodge is presented by your committee in a separate part of this report for the convenience of the Senate in passing upon the questions raised by that amendment. (p. 17).

The committee, while not laying down any general principles on a subject upon which its membership was divided, devotes a large portion of its report (pp. 237-435) to a review of the findings of the Court of Claims in each individual case. Without making any specific recommendations, these comments, by segregating what is styled the "actual property loss," imply that even if the claims are to be allowed at all, all items going beyond the bare value of vessel and cargo when they left their destination on the voyage upon which they were captured

³⁰ H. Rep. No. 288, 62nd Cong., 2nd Sess.

³¹ S. Rep. No. 770, 62nd Cong., 2nd Sess.

ought to be eliminated and the allowance confined to the initial value of the vessel and cargo at the home port in the United States. This view would exclude premiums of insurance paid and freight for the voyage which were allowed by the Court of Claims wherever applicable, as well as profits for the voyage and interest, neither of which have ever been allowed by the Court of Claims.

A minority report signed by five members of the committee accompanied the majority report. This minority report, while making no specific reference to French spoliation claims, is based upon principles which apply with full force to those cases as well as to others specifically referred to by the minority. The following remarks from the minority report forcibly state the view of the dissenting members in favor of following the precedent set by the enactment of previous claims bills: ³²

Previous Congresses have paid exactly such claims as these, without question as to their justice. While it is true that one Congress can not bind another Congress, yet it is equally true that the United States Government is an entity — a political unit — and that the government, acting by Congress, can take such a position that succeeding Congresses must rest under the highest moral duty of consummating some act commenced by a preceding Congress.

Because a claim was referred to the Court of Claims by a previous Congress, under the necessarily implied understanding that it will be paid if proven, the present Congress is not in good morals absolved from the duty of carrying into effect that understanding.

It should be borne in mind, also, that a very large proportion of the claims contained in the pending bill as passed by the House of Representatives were contained in bills which passed the Senate in the Sixtieth and Sixty-first Congresses, and therefore bear the approval incident to twice passing the Senate and of passing the House of Representatives in the Sixty-first Congress and again in the pending bill.

It would assuredly seem that some effect and weight should be given, in reason, to this previous action by both Houses of Congress.

One of the well-recognized rules of law applied in the courts is that of *stare decisis*, and while it can not be said that this precise doctrine has application to matters coming before Congress, it has been usual to accord weight to precedents furnished by previous congressional action.

* * * * *

One of the cardinal principles of law applied in the courts is that of *stare decisis*. It is largely upon that principle that stability of the law is founded. While it can not be said that precisely that rule is applicable

³² S. Rep. No. 770, 62nd Cong., 2nd Sess., Part 2, pp. 14, 15.

to matters coming before Congress, it is nevertheless a fact that parliamentary law in its general sense, and as followed in the Houses of Congress, is made up in part of express rules and also in large part of precedents and rulings.

While it is unquestionably within the power of either House of Congress to disregard every precedent upon any point or subject of legislation, heretofore some weight has been accorded to precedents established by repeated enactments along a certain line.

So far as precedents have been set by enactment of what are termed "omnibus claims bills," the proposed amendment of the House bill as it comes from the committee is opposed to the precedents so established.

* * * * *

If considered as a bill for payment of all favorable findings of the Court of Claims, regardless of class or kind of claims, then no discrimination should be made either in favor of any one class of claims or against any class.

This broad view should be taken that when a claim has been tried in the Court of Claims, the tribunal established by Congress for this very duty, and when that court has made a report of the proven facts which report shows that the claim is a just claim upon the United States, then that claim should in honor be paid.

* * * * *

While Congress reserves to itself the right to pay or not to pay any claim, and might arbitrarily refuse to pay even a claim in favor of which a judgment has been rendered under the general jurisdiction of the Court of Claims, the findings of that court must either be taken as correct or they must be cast aside, and in the latter event the sooner the Court of Claims is abolished the better. It is not believed that the very body which established the Court of Claims should discredit that court or its judicial action.

The principles here so forcibly stated are believed to be entirely just, and of course apply in full force to these French spoliation claims equally with claims arising out of the Civil War, which were those specifically referred to by the minority in making its remarks.

No action had been taken in the Senate on this bill down to the time of the adjournment of the long session August 26, 1912.

Well might the veteran Senator Hale of Maine say, as he did April 7, 1908: "We can not get the omnibus claims bill passed, which has a thousand items that ought to be paid as much as a note of hand ought to be paid." ³³

³³ Cong. Rec., 60th Cong., 1st Sess., Part 5, p. 4459.

ALLOWANCES BY INTERNATIONAL TRIBUNALS

The policy of reducing or scaling down allowances made by a duly authorized judicial tribunal would be a new one to our jurisprudence or legislative practice. Questions of details and amounts of allowances are supposed to be subjects appropriate for the consideration of a court after argument by counsel. The statement of President Taft, above quoted from his message of December 21, 1911, that "the findings and awards were obtained after a very bitter fight, the Government succeeding in about seventy-five per cent of the cases," is a very conservative one, fully supported by repeated annual reports of the Attorney General. If Congress is to review the details of the allowances made by the Court of Claims, then, in justice, the heavy disallowances made by that court should be reviewed also with the object of ascertaining whether they too are not erroneous. Were such a review once entered upon, it would result in demonstrating that the Court of Claims in acting upon these cases has granted a far less liberal measure of relief than has ever been given by any previous tribunal, domestic or international, acting upon claims of a similar character in our history. Some of these details of allowances by previous courts and commissions have been given under the heads of value, premium of insurance, freight, etc., in the July number of the *AMERICAN JOURNAL OF INTERNATIONAL LAW*, pp. 629-634.

Necessary limitations of space forbid extended quotation from the decisions of these tribunals. Some references, however, will show the reader the spirit in which such courts and commissions have treated claims of this character.

The Jay treaty of 1794 with Great Britain³⁴ provided in its seventh article (pp. 273, 274) for an examination of claims of American merchants for illegal captures and condemnations of their vessels and cargoes by the British under much the same circumstances as those connected with the claims for spoliations committed by the French, now under consideration. The British commissioner in that tribunal took the position "that to reimburse the claimants the original cost of their property and all the expenses they have actually incurred, together with interest on the whole amount would be a just and adequate com-

³⁴ Public Treaties of the United States, 1875, pp. 269-282.

pensation." This view, however, failed to meet the approval of the majority of that commission.

William Pinkney, the American commissioner, said:

The majority were of opinion that the claimants were entitled not only to the value of their merchandise, but to the net profits which would have been made of it at the port of destination, if the voyage had not been interrupted.

His learned and brilliant opinion, giving the reasons for this conclusion of the majority of the board, will be found in the *Life of William Pinkney*, by Henry Wheaton, New York, 1826, pp. 259-264.

The character of the allowances actually made by this commission under the treaty of 1794 is thus stated in a report made long afterwards on a different, though analogous, class of cases:

Reference was made to several cases before the Commission under the Treaty of 1794, in which it was said that the Commissioners, as indemnity for captures held to have been unlawfully made, allowed not merely the value of cargoes, but net profits which would have been received if the cargoes had reached their port of destination and which, in some cases, amounted to nearly 100 per cent.³⁵

The commission under the Florida treaty of 1819 with Spain, in its final report of its proceedings to the Secretary of State, said: ³⁶

In adjusting the amount of the claims allowed, the Commission has adopted these principles. Regarding the fund provided by the Treaty as designed to indemnify claimants for actual losses sustained, and not to realize profits which might or might not have been made, the board has generally taken up the voyage at its commencement, and allowed the value of the vessel and cargo at that time. To the value of the vessel, two-thirds of a fair freight for the passage in which the loss occurred has been added. A fair premium of insurance for the risk of such a passage has been also added to each of these insurable subjects. And the costs and expenses, incurred in defraying their rights, have been allowed to all claimants who have paid such, and have offered any evidence from which the sums so paid might be inferred. Such has been the general mode of estimating the quantum of loss to be indemnified, in most of the cases where the loss has been total.

³⁵ Report of Her Majesty's Agent of the Proceedings and Awards of the Mixed Commission on British and American Claims, Established under the Treaty of 1871, pp. 106, 107.

³⁶ Moore's *International Arbitrations*, Vol. 5, p. 4516.

Reference has been made ³⁷ to the decisions of the commissions on the French indemnity of 1831, under the Van Ness convention of 1837-38, and on the distribution of the Danish indemnity, as well as of the Court of Commissioners of Alabama claims, and of Sir Edward Thornton, umpire under the treaty of 1868 between the United States and Mexico.

In addition to the Alabama claims constituting grievances on our side against Great Britain, British citizens had their claims against us. These arose from the seizure of British vessels with their cargoes by our navy during the Civil War on the charge either of attempting to break the blockade of the southern coast or of carrying contraband to the Confederates. These vessels were libelled in our admiralty courts. Some were condemned, others released, though generally without damages for detention or loss of freight.

A mixed commission was provided for by the treaty of 1871 for the settlement of all miscellaneous claims of citizens of either country against the other. Before this mixed commission, claims were preferred on behalf of the British owners of vessels and cargoes, thus seized, and condemned, or even where they were released, for the damages attending the detention. Several decisions even of the Supreme Court of the United States were re-examined, and in effect reversed by this commission.

Notably was this done in the case of the *Circassian*, where the Supreme Court ³⁸ condemned the vessel with her cargo as lawful prize, on the charge of breach of blockade. The commission under the Treaty of Washington held this judgment unjustifiable, and made awards amounting to \$20,540 for freight, \$133,296 to the underwriters on the cargo, and \$71,428 to the owner of a mortgage on the vessel, which mortgage became incapable of being enforced by the capture of the vessel.³⁹

In the case of the *Sir William Peel*, the Supreme Court ⁴⁰ held that the vessel was not guilty of either carrying contraband or breaking the blockade. Inasmuch, however, as the court held that there was probable

³⁷ AMERICAN JOURNAL OF INTERNATIONAL LAW, July, 1912, pp. 629-634.

³⁸ 2 Wall. 135.

³⁹ Report of Her Majesty's Agent of Proceedings and Awards of Mixed Commission on British and American Claims, London, 1874, pp. 124-133.

⁴⁰ 5 Wall. 517.

cause for the capture, although the vessel and cargo were restored to their owners in full, it was without costs or expenses.

The mixed commission allowed the owners of this vessel and cargo the enormous sum of \$272,920 for these merely incidental damages, the items of claim being stated to be "detention of the vessel," "interest on this sum," "interest on the insured value of the cargo," and "ten per cent on insured value of cargo for loss of profit."

The same principle was applied to claims made by American citizens and pressed by our State Department against the British Government arising out of captures made at sea by vessels of the British navy during the Boer War. The claimants were owners of portions of the cargoes on these vessels. The vessels themselves were British and were charged with trading with the enemy in violation of the laws of Great Britain.

President McKinley, in his annual message of December 3, 1900, said: ⁴²

Such consignments in British ships, by which alone direct trade is kept up between our ports and Southern Africa, were seized in application of a municipal law prohibiting British vessels from trading with the enemy without regard to any contraband character of the goods, while cargoes shipped to Delagoa Bay in neutral bottoms were arrested on the ground of alleged destination to enemy's country. Appropriate representations on our part resulted in the British Government agreeing to purchase outright all such goods shown to be the actual property of American citizens, thus closing the incident to the satisfaction of the immediately interested parties, although, unfortunately, without a broad settlement of the question of a neutral's right to send goods not contraband *per se* to a neutral port adjacent to a belligerent area.

The correspondence shows that our government repudiated the idea that the mere restitution of the goods themselves would discharge the claim.

Mr. Choate wrote Lord Salisbury February 6, 1900: ⁴³

The obligation of restitution of these cargoes to their owners being conceded, the permission extended to the owners to come and take them at ports short of the port of destination can not be considered as a discharge of that obligation, as delivery at the port of destination is, in

⁴¹ *Ibid.*, pp. 107-113.

⁴² Foreign Relations, 1900, p. XXI.

⁴³ Foreign Relations, 1900, pp. 585, 586.

a commercial sense, the act which gives them the value intended, and you would not claim that you require the owners to go elsewhere for them; and as to all such goods as your note of the 2d relates to, which can not be carried on in British vessels because of your municipal law, or in other vessels, because there are no other to take them, they are as inaccessible to their owners for all the purposes of their commercial adventure as if they had been landed on a rock in mid ocean.

The discharge from the vessel and landing short of the port of destination, and failure to restore and deliver at that port, constitute wrongful acts as against all owners of innocent cargo; etc.

The ultimate settlement of the claims was on the basis insisted upon by Mr. Choate.

See the interesting discussion of these claims by Mr. Robert Granville Campbell, in *Neutral Rights and Obligations in the Anglo-Boer War*, Johns Hopkins University Studies in Historical and Political Science, Series XXVI, Nos. 4, 5, 6.

In 1902 there was an arbitration at The Hague of claims of certain American vessels unlawfully captured by Russia in the Russian part of Bering Sea on charges of illegal sealing. The arbitrator was Mr. T. M. C. Asser, member of the Council of State of the Kingdom of the Netherlands. His decisions are found in the report of the counsel for the United States.⁴⁴

He allowed in all cases, in addition to the value of the property, damages for "loss of catch." This was, under the circumstances of those cases, the equivalent not merely of freight but of loss of profits in addition. He stated in the judgment the following reason for making this allowance: ⁴⁵

Considering that the general principle of civil law, according to which the damages should include an indemnity, not only for the loss suffered, but also for the profit of which one has been deprived, is equally applicable to international litigation, and that in order to apply it, it is not necessary that the amount of the profit of which one is deprived should be exactly determined, but that it suffices to show that in the natural order of things one would be able to realize a profit of which one is deprived by the act which gives rise to the claim.

From these citations it appears that all international commissions have allowed not only items similar to those granted by the Court of

⁴⁴ Printed as Appendix I to the Foreign Relations of the United States for 1902.

⁴⁵ Foreign Relations, 1902, Appendix I, p. 453.

Claims, but others not granted by that court, notably for insurance premiums not actually paid, for loss of profits and for interest.

Senator Gallinger of New Hampshire, with great force said (December 16, 1910):

If there is due a tenth part of the amount that we propose to give to the survivors of the men who lost their property by French cruisers they will not get any more than they ought to get or would get if interest was allowed to them on the amount of money that ought to have been paid to them long ago, according to the opinions of all these great committees and the great men who have reported in their favor.⁴⁶

THE SUPREME COURT

While the Supreme Court of the United States rarely has occasion to pass upon claims of an international character, the few authorities which can be found in the reports of that court all sustain such charges in principle.

In *Murray v. Schooner Charming Betsey*,⁴⁷ the court directed

That the said commissioners be instructed to take the actual prime cost of the cargo and vessel, with interest thereon, including the insurance actually paid, and such expenses as were necessarily sustained in consequence of bringing the vessel into the United States, as the standard by which the damages ought to be measured.

In the *Anna Maria*⁴⁸ where the detention of a vessel was held to be unjustifiable, the Supreme Court concluded its opinion by Chief Justice Marshall with the following direction as to the mode of ascertaining the damages:

The sentence of the circuit court must be reversed, and the cause remanded to the circuit, with directions to reverse the sentence of the district court, and to direct commissioners to ascertain the amount of damages sustained by the libellants; in doing which the value of the vessel, and the prime cost of the cargo, with all charges, and the premium of insurance, where it has been paid, with interest, are to be allowed.

So, too, in the *Baltimore*,⁴⁹

⁴⁶ Cong. Rec., 61st Cong., 3d Sess., Part 1, p. 353.

⁴⁷ 2 Cranch, 64, 125, 126.

⁴⁸ 2 Wheaton, 327.

⁴⁹ 8 Wall. 377, 386.

Restitution or compensation is the rule in all cases where repairs are practicable, but if the vessel of the libellants is totally lost, the rule of damage is the market value of the vessel (if the vessel is of a class which has such value) at the time of her destruction.

Allowance for freight is made in such a case, reckoning the gross freight less the charges which would necessarily have been incurred in earning the same, and which were saved to the owner by the accident, together with interest on the same from the date of the probable termination of voyage.

It is not indeed believed that any authority can be found, either international or domestic, which would deny to a shipowner injured by the unlawful breaking up of a voyage, his lawful freight for that voyage, or to the owner of either vessel or cargo, recovery for the premium of insurance paid on the property for the voyage.

AMOUNT OF REMAINING CLAIMS

The next omnibus claims bill, whenever passed, will undoubtedly make provision for the payment of the amount of these claims now pending before Congress, which we have seen to be \$945,157.51.

Only a very small amount of claims still remain pending before the Court of Claims in comparison with those already adjudicated. The contemporary estimate of the amount of these claims shows that the actual value of property captured and destroyed by the French during the period covered by these claims far exceeds all allowances made, and to be made, by the Court of Claims under the Act of 1885.

A report of Timothy Pickering, Secretary of State, dated January 18, 1799⁵⁰ refers to —

Those unjust and cruel depredations on American commerce, which have brought distress on multitudes, and ruin on many of our citizens; and occasioned a total loss of property to the United States, of probably more than twenty millions of dollars; besides subjecting our fellow citizens to insults, stripes, wounds, torture, and imprisonment.

This estimate of twenty millions of dollars as the amount of the claims, was made long before the end of the period covered by the French spoliation claims, September 30, 1800.

The figures given above show that less than four million dollars have been appropriated by Congress for the payment of the awards of the

⁵⁰ S. Doc. No. 102, 19th Cong., 1st Sess., 430.

Court of Claims, and that there are now pending before Congress for payment awards of the same character as those already appropriated for, amounting to less than one million dollars. When these awards are provided for in the next omnibus claims bill or other appropriation made by Congress, there will have been appropriated by Congress less than five million dollars, or about one-fourth of the amount estimated as the total of these claims at a date long before the French spoliations on American commerce had ceased.

These figures are very significant as showing the stringent character of the rulings of the Court of Claims in exclusion of claims, not only as to the classes of claims allowable under the terms of the French Spoliation Act, but also as to the character of evidence by which claims, legally admissible, can be supported. The government has been a great gainer by the lapse of time. Many claims, which could have been proved by ample evidence within a few years from the date of the occurrence, when witnesses were living and accessible, can now never be established. As there remain comparatively few claims to be proved up and established before the Court of Claims, it is safe to assert that the ultimate total liability of the United States in these cases will be far below six million dollars.

GEORGE A. KING

THE NINTH INTERNATIONAL RED CROSS CONFERENCE

The Ninth International Red Cross Conference met at Washington on the 7th of May, 1912. During the ten days that the conference sat (7th-17th), very much work was accomplished; at the same time the foreign delegates were given an excellent opportunity of seeing the beautiful American capital and of enjoying the renowned American hospitality; every evening was given up to some entertainment and many of the afternoons also. Conspicuous by its charm and beauty was the reception of the President and Mrs. Taft on the lawn of the White House. The social events culminated in a large banquet given on the 16th by the American Red Cross. Next day the delegates took leave of their hospitable hosts.

Unfortunately, the President was unable to open the conference in person, as had been previously planned, on account of the political campaign just then running at its height. It was Senator Elihu Root who opened the conference and delivered a speech of welcome in which he reviewed the great aims of the Red Cross.

The conference voted thirteen resolutions, some of which are of far-reaching importance.

The first resolution dealt with the character of Red Cross supplies and was proposed by Dr. Farkas of Hungary. He emphasized especially the advisability of using extremely simple materials in all Red Cross work and of having a sufficient supply prepared in advance and always easily available.

Next came the question of dealing with the magnificent donation of the Empress of Japan. Her Majesty gave to the Red Cross 100,000 yen (\$50,000) for the encouragement of Red Cross work in times of peace. The conference decided to give the foundation the name of Her Majesty in order to commemorate this gracious act. The capital is left until 1917 to the care of the Japanese Society of the Red Cross, which is also to work out the statutes for the future administration of the fund. The International Committee of Geneva will in due time consult the

different central committees of the Red Cross as to the best ways of making use of this capital, which question will be finally settled by the tenth conference in 1917.

In this connection, one must note that lately the peace work of the Red Cross has taken very broad forms. All over the world it helps the poor and the destitute; in times of calamities agents of the Red Cross are always among the first to render aid to the sufferers; everyone knows of the splendid work accomplished at Messina, and San Francisco, and during the inundations of Paris. Then also the Red Cross has done very much in helping the people in cases of epidemics and is fighting successfully such scourges of humanity as tuberculosis. Thus, very great help has been brought to suffering humanity by the work of the Red Cross. At the same time this work during times of peace is a splendid school for the Red Cross, keeping its organization in active running order and giving it practical experience that is of incalculable value in case of war. Only by thus working during times of peace can the Red Cross prepare itself and make itself efficient for its great object, the relief of the wounded in times of war. The work of the Red Cross in times of peace consequently attains simultaneously two aims. The head of the French delegation, General Michal, gave a very good example of the case by saying that if the Red Cross should not work during times of peace preparing itself for the work in time of war, it would be like a fire engine never tried before a fire, so that when a fire really broke out and the engine was needed, it would be found that the machinery was rusted and the engine would not work.

Following the proposal of the Servian Red Cross, the conference adopted a resolution asking the governments to provide legal guaranties for the existing rights and privileges of the Red Cross and grant it Red Cross as well some new privileges, as, for example, freedom of custom duties, exemption of taxes, free postage, etc.

A vote of thanks was passed by the conference addressed to all the governments which introduced into their respective parliaments projects of laws guaranteeing the Red Cross from abuses of its name and insignia. The question was raised at the conference of London of 1907, where the different central committees of the Red Cross were asked to report on the measures taken by their governments for the protection of

the Red Cross. The committees sent a number of such reports to the conference at Washington, which show that the great majority of governments are taking active interest in the matter. Many countries have already quite efficient legislation on the question, whereas others have introduced such legislation for the consideration of their parliaments, the latter having not yet had time to pass the required measures. It is most encouraging to see how much is done nowadays for the protection of the Red Cross and to see how greatly the governments are interested in its work, which also proves that the governments have great confidence in the Red Cross and in its efficiency.

At the instigation of the American Red Cross, the conference adopted a special resolution dealing with the activity of unauthorized societies which make use of the insignia and name of the Red Cross. The conference had in view an "International Order of the Red Cross," which worked without any authorization from the Red Cross Central Committee or the American Government, whereas according to the Convention of Geneva only such societies can be recognized by the Red Cross as are officially recognized by their respective governments. This is an important decision of the conference, as much harm can be done by such unauthorized societies to the work as well as to the *renommé* of the Red Cross. The unauthorized associations not being under the general control of the Red Cross or of the governments, cannot be made responsible for their acts infringing the interests of the Red Cross, and certainly will never be allowed by the governments to take any part in relief work in times of war. Unfortunately, one can cite many examples of such harm having been done to the Red Cross by unauthorized societies.

The conference further passed a resolution concerning aid given to the soldiers in times of peace. This question was raised by the International Committee of Geneva, which had in view rendering medical aid to sick soldiers in such a way as to create a method of coöperation between military and civil medical authorities.

Further, according to the proposal of the French Red Cross, the conference agreed on a resolution concerning prisoners of war. The French Red Cross asked for the institution of a special committee which should be given charge of the work of collecting all the gifts and all that is sent

in general from the outside to prisoners of war (for instance, by their families and relatives); all such gifts it was proposed should be forwarded to the International Committee of Geneva, who would ask the neutral governments to deliver them to the prisoners of war. Each national society ought to have such a special committee organized for this purpose; the expenses would be covered by the respective societies of the Red Cross.

This matter was deemed by the conference of such importance, that a special "rider" was attached to the French resolution, requesting the American Red Cross to extract it immediately from the protocols of the conference and send it to all the central committees in order to draw their attention to the case. It was further decided that the question ought to be definitely settled, according to the wishes of the different societies of the Red Cross, not later than June first, 1913.

One can hardly foresee that the governments will make difficulties in this matter, considering its humanitarian object. Thus, one may expect that next year some solution of it will be successfully worked out, and in case of a future war, the Red Cross will be, in consequence, able to give its aid to the respective prisoners of war. If one calls to mind the example of the Russo-Japanese War of 1904-1905, one can easily see how much could be done by the Red Cross in establishing such communications between the prisoners held in captivity in a far away land and their families and relatives, who often do not even know the fate of their wounded.

This may be thus looked upon as the great humanitarian achievement of the Ninth Conference.

The Italian delegates proposed, and the conference unanimously agreed to, a resolution asking the societies of the Red Cross to aid in the publication and distribution of the International Bulletin of the Red Cross, edited and published by the International Committee of Geneva. This bulletin is rightly considered as the best possible means for the different societies of the Red Cross of the world to keep in touch and to know what is being done for the Red Cross and by the Red Cross.

Further, the conference adopted, according to the Russian proposal, new statutes regulating the administration of the international fund called "Empress Marie Feodorovna." The income from this fund is

distributed every five years in prizes for the best inventions concerning the medical aid or the nursing of wounded and suffering soldiers. The next distribution will take place in 1917 at the Tenth International Conference. The new statutes intrust the Russian Central Committee with the administration of the fund, the investments, etc. The distribution of prizes is intrusted to a special international jury, which meets at every international conference of the Red Cross and is composed of eight members, one always being a Russian delegate, a second one being a member of the International Committee of Geneva, the other six belonging to different countries, selected by lot every five years.

The Ninth Conference had further to settle the question of the administration of a similar fund called "Empress Augusta." It was decided that the prizes of this fund shall in the future also be distributed only once in every five years by the international conferences.

Finally, the conference decided to award a special medal in memory of Miss Florence Nightingale, the famous nurse of the Crimean War. This medal, with a corresponding certificate, is to be given annually to six nurses, who have done the best work in helping the sick and wounded in times of peace or war. The medals are to be given from the income of a fund, called the "Fund of Florence Nightingale." These prizes will be distributed by the International Committee of Geneva, the names of the candidates for the medals being submitted to the International Committee by the national societies of the Red Cross. Each national society will have the right to submit the name of only one nurse. The working out of details for this plan is intrusted to a special committee, which will have to report in the near future to the International Committee. Sir John Furley, the eminent representative of the Order of St. John of Jerusalem, was elected president of this special committee.

We see thus that the resolutions adopted by the Ninth Conference can be classified into four groups, the first concerning the material used by the Red Cross; the second dealing with the aid of soldiers and prisoners of war; the third group of resolutions concerning the question of protection of the Red Cross, and, finally, the fourth dealing with the different funds now intrusted to and administered by the Red Cross.

Another group of resolutions, discussed by the conference but not voted on nor agreed to, constitute those which the conference found it

necessary previous to their final settlement to submit to the consideration of the international and central committees. They were not deemed quite ripe yet for immediate adoption.

These were:

1. The Cuban proposition of adopting an international insignia for the members of the societies of the Red Cross, superseding the now existing national insignia; many members of the conference considered the latter and the usual Red Cross mark quite sufficient; they also foresaw great difficulties in the way of the adoption of a new international insignia.

2. The French proposal of introducing Esperanto as the official language of the Red Cross, which should be taught compulsorily to all the Red Cross personnel.

3. The second French proposal of recognizing officially the trained dogs used by the Red Cross in the relief work of the wounded on the battlefield. This question was rightly considered as belonging to the competence of the governments who alone, according to the Geneva Red Cross Convention, have the right to decide on such matters.

4. The Brazilian proposal of erecting a monument to commemorate the Red Cross, and the Argentine proposal of establishing a Red Cross day to be kept as an international holiday.

5. The Russian project of having special cards of identification for the wounded removed from the battlefields in order that the surgeons in the hospitals at the rear could know at first glance if a man has to be operated on or if transportation is dangerous for him. The French army has already established a sort of card of identification (*fiches diagnostiques*) which, according to the testimony of the French delegates, has proved to be very useful.

6. The Chinese resolution, concerning the work of the Red Cross in countries where the principle of extraterritoriality is applied to foreign subjects, was considered by the conference of too great importance from the point of view of international law to be adopted without a special investigation. The Chinese delegates wanted the conference to express a wish according to which the foreign societies of the Red Cross, which may be established in countries where foreigners live under the protection of extraterritorial rights, would be always subordinated to the local

national society of the Red Cross. One may easily see how important such a matter could become in China.

The conference registered with satisfaction the accession of two new national societies of the Red Cross in the East, those of China and Siam, each of which, according to their reports, have already accomplished a great deal of good work. The conference also expressed a sincere wish to see at the next conference a representative of a new society of the Red Cross of Persia, which country up to the present time has not taken part in the Red Cross work.

Finally, the conference forwarded to all the committees of the Red Cross the invitation, proffered by Mr. Richardson, to take part in the San Francisco-Panama Exposition of 1915; the conference expressed the hope that the Red Cross will take an active part in it and will provide for a section of its own at the exposition.

The conference disposed in a similar way of the invitations for the next (Tenth) International Conference, proffered by the Portuguese Red Cross, the Brazilian Red Cross and the Japanese Red Cross. It must be added that the Japanese Red Cross had already extended such an invitation, at the conference of London of 1907, but preference was then given to the American invitation, in consequence of which the Ninth Conference was held in Washington. These three invitations were sent to the International Committee, which will have to decide by 1914 and take into consideration the wishes of the different societies of the Red Cross as to where the next conference will meet.

PROF. BARON S. A. KORFF,
University of Finland.

THE INTERNATIONAL OPIUM CONFERENCE

This conference, — the latest of the Hague Conferences to which the United States was a party, — was proposed by the United States on September 1, 1909, and convoked by the Netherlands Government on December 1, 1911. It dealt in a judicial manner with the varied and conflicting interests, diplomatic, moral, humanitarian and economic, of those governments represented and with the known similar interests of those not represented. Several of the governments in making pledges for the obliteration of the opium evil did so in the face of an eventual large financial sacrifice, but this was done thoughtfully and generously.

The conference determined upon and on January 23rd last signed a convention for the suppression of the obnoxious features of their national and of the international opium, morphine and cocaine traffics, and for the regulation of that part of the production of and trade in the drugs which may be said to be legitimate. To China was confirmed much that she had contended for for a hundred years or more as to the vexatious export of Indian opium to her shores. This act, however, was but a broader recognition of what the British Government had, as between India and China, already yielded to China by virtue of the so-called Ten Year Agreement of 1907,¹ and by the modification of that agreement signed at Peking on the 8th of May, 1911.²

To the United States is due the credit of having initiated an international and national movement of such wide scope, involving diplomatic and economic interests and difficulties that scarcely anyone foresaw. For in the autumn of 1906 the American Government, after repeated urging, and as the result of a pressure not easy to define, boldly ventured on a solution of the opium problem as seen in the Far East, a venture which has been extended by the coöperation of twelve other Powers to a solution of the problem as it affects the world generally.

President Roosevelt and Secretary of State John Hay had held favor-

¹ *Vide*, this JOURNAL, October, 1909, p. 835.

² *Vide, infra*, p. 878.

able though judicious hearings on the subject with many people representing humanitarian, moral and economic interests; following these Mr. Elihu Root, the then Secretary of State, formulated a plan, the design of which was to bring the Far Eastern opium traffic to an end, it being plain that that traffic was generally regarded as deplorable, as one of the most serious causes of the first Anglo-Chinese war,³ and of repeated if not continuous friction between China and Great Britain, with adverse economic and diplomatic consequences felt by every Power having intercourse with the former.

To secure the end sought for, it was essential that the United States obtain the support of those Western Powers having territorial possessions in the Far East, and of certain of the Oriental States, more particularly China and Japan. The United States had become a Far Eastern Power in the larger sense through the acquisition of the Philippine Islands, and having maintained a fairly high record of accord with China as to the viciousness of the opium traffic⁴ and having attempted, as far as this could be done by national and local legislation, to protect the population of the Philippine Islands from the opium vice,⁵ it was in the best diplomatic position to approach the interested Governments.

The coöperation of the major Powers having treaty relations with China was early and willingly offered to the United States, but one may suppose not without some misgivings in European chancellories at the temerity of this Government's venture. From that moment the design of the Department of State broadened and embraced several other governments directly or indirectly interested in some phase of the problem. By the autumn of 1908 twelve states of Europe and Asia had ranged themselves beside the United States in international brotherhood, and up to the present moment have remained there.

Mr. Robert Bacon was Assistant Secretary of State at the time the American Government initiated the international movement for the settlement of the Opium problem, and upon him fell the responsibility of the negotiations which led to the assembling of the International Opium Commission. If the Hague Conference, — with which this paper par-

³ The so-called Opium War of 1839-41.

⁴ *Vide*, JOURNAL, October, 1909, p. 649.

⁵ *Vide*, JOURNAL, October, 1909, p. 670.

ticularly deals, — achieved a decisive result, it was largely due to the broad lines upon which Mr. Bacon encouraged and kept the negotiations for the International Opium Commission, and to the official support and confidence which later as Secretary of State he accorded to the American representatives on that commission.

The International Opium Conference, composed of delegates with full powers, was a sequel of the International Opium Commission which met at Shanghai, China, February, 1909. That commission was, generally speaking, a commission of inquiry, somewhat conforming in action to such commissions, as provided for by the Hague Peace Conference of 1899.⁶ What that commission accomplished, both directly and indirectly, was described in the JOURNAL for July and October, 1909, and the progress of the movement since the commission adjourned has been outlined in the editorial columns of the JOURNAL for April, 1911.

It is the purpose of this paper to continue the narrative of international coöperation to solve the opium and allied problems, and to demonstrate that by the steady, persistent effort of the United States, by a continuity of policy running from the hands of Mr. Root into the hands of Mr. Bacon and Mr. Knox, the world will shortly see the obliteration of the Indo-Chinese opium trade, the release of China from the bonds of her own unnecessary production and vicious consumption of opium, as well as the regulation of the legitimate opium and allied traffics of the nations of the four continents.

As stated above, the International Opium Commission met at Shanghai in February, 1909. Its conclusions that the opium vice should cease and that the illicit morphine traffic must be discontinued, were unanimous.⁷ But these conclusions were on their face only moral in effect. Nevertheless they cleared all doubt as to future action, and left it open to the United States to proceed to propose that a conference, composed of delegates with full powers, should meet at The Hague to conventionalize the conclusions of the commission. Therefore on September 1, 1909, the Department of State addressed a circular proposal to the interested governments — that is to those represented on the International Opium

⁶ International commissions of inquiry recommended by the Hague Peace Conference, 1899, Articles 9-14.

⁷ *Vide*, Resolutions, SUPPLEMENT to the JOURNAL, 3:275 (July, 1909).

Commission — in which *inter alia* it was stated that the Government of the United States had learned with satisfaction of the results achieved by the International Opium Commission, that it was the opinion of the leaders of the anti-opium movement that much had been accomplished and that both the Government and people of the United States recognized that the results were largely due to the generous spirit in which the representatives of the governments concerned approached the questions submitted to them. The American appreciation of the magnitude of the opium problem and the serious financial interests involved were dwelt upon, and it was pointed out that as the result of inquiries in the Philippine Islands and the United States itself, the opium problem was of great material as well as humanitarian interest to the American people and Government. Mention was then made of the fact that on February 9, 1909, during the sitting of the International Opium Commission, the Congress had passed and the President had approved of an act forbidding the importation of opium into the United States except for medicinal purposes, thus cutting out by a stroke of the pen a previous per annum importation of nearly two hundred thousand pounds of opium prepared for smoking, used mostly by Chinese residents in the United States, but also by over 150,000 Americans. Continuing, it was stated that the United States was not an opium producing country, and that to enable it to effectuate the above mentioned legislation, it was necessary to secure international coöperation and the practical sympathy of opium producing countries. Further, that although no formal declaration had been made at the International Opium Commission, it was a matter of discussion by the commissioners that however important the commission's conclusions were morally, they would fail to satisfy enlightened public opinion unless by subsequent agreement of the Powers they and the minor questions involved in them were incorporated in an international convention. Greatly impressed by the gravity of the opium problem and the desirability of divesting it of local and unwise agitation, as well as the necessity of maintaining it upon a basis of fact, as determined by the Shanghai Commission, the United States proposed an international conference to be held at The Hague, and that the delegates thereto should have full powers to conventionalize the resolutions adopted at Shanghai and their necessary consequences. A tentative programme, composed of fourteen

items, was submitted, nearly all of these items becoming a part of the definitive programme of the conference. They included such items of interest as follows: effective national laws to control the production, manufacture and distribution of opium; restriction of the number of ports through which opium might be shipped by opium producing countries; prevention at the port of departure of the shipment of opium to countries which prohibit or wish to prohibit or control its entry; reciprocal notification of the amount of opium shipped from one country to another; regulation by the Universal Postal Union of the transmission of opium through the mails; restriction or control of the production of opium by countries which did not then produce it to compensate for the reduction in production being made in British India and China; the restudy of treaty obligations under which the opium traffic was being conducted; uniform provisions of penal laws concerning offences against any agreement entered into by the Powers in regard to opium production and traffic; uniform marks of identification of opium in international transit; government authorization to be granted to exporters and importers of opium; reciprocal right of search of vessels suspected of carrying contraband opium; measures to prevent the unlawful use of a flag by vessels engaged in the opium traffic; the application of a strict pharmacy law to the nationals of the Powers in the consular districts, concessions and settlements in China; the advisability of an International Supervisory Commission to be intrusted with the carrying out of any international agreement concluded by the Powers.

The proposal of the United States did not attempt to prescribe the scope of the conference or to present a programme which might not be varied or enlarged; and finally the Powers were asked that a delegate or delegates be appointed, furnished with full powers, to negotiate and conclude an agreement based on the conclusions of the Shanghai Commission and other important questions involved in them.⁸

It is to the great credit of eleven of the Powers to which this proposal was made that they promptly and heartily responded and offered to continue coöperation with the United States for final international settlement of the opium problem. By the middle of May, 1910, the American proposal had been almost generally accepted and the Nether-

⁸ For proposal, *vide*, SUPPLEMENT, p. 258.

lands Government had very courteously and quickly offered to assemble the conference at The Hague.

However, one Power had regretted its inability to send delegates to the conference,⁹ and another had failed to respond definitely to the American proposal by May, 1910, namely, Great Britain. There has been considerable ill-advised criticism of this delay on the part of the British Government; but the delay, as will be shown later, was due not to a want of sympathy or to a determination not to coöperate with the other governments, but partly because Great Britain was then negotiating a modification of the Ten Year Agreement made between herself and China in 1907, — it being the natural desire of statesmen like Sir Edward Grey and Lord Morley that the opium question as between Great Britain and China should be advanced more nearly to the fulfillment of China's desires before the conference met. In addition to this, the British Government was greatly concerned over the morphine and cocaine traffics; for it had been shown beyond a doubt that immense quantities of these drugs were being smuggled into British India to take the place of opium; also that in China they tended to supplant the use of opium which the British Government had agreed that India should soon cease to export, and the production and use of which China on her part had agreed to suppress. But in September, one year after the American proposal was made, the British Government tendered its coöperation with the American and other governments, laying down as a condition of its acceptance of the American proposal that the Powers should agree before the conference met to study the question of the production of and traffic in morphine and cocaine, and pledge themselves beforehand to the principle of drastic legislation against such production and traffic equally effective with the measures she had taken or proposed to take for the ultimate obliteration of the Indo-Chinese opium trade.

Had the British proposals in regard to the morphine and cocaine traffics not been made, there is little doubt that the conference would have assembled early in 1911; but it was recognized by all concerned that though the British proposals were sound and necessary, they required the grave consideration of several of the governments whose sub-

⁹ Austria-Hungary, which nevertheless expressed a determination to watch the conference with sympathy.

jects were heavily interested in the manufacture of and traffic in these drugs. They were particularly important to Germany, as one of the largest producers. Nevertheless, after due consideration, all of the governments accepted the British proposals, and the date of the assembling of the conference was finally fixed by the Netherlands for December 1, 1911. In the meantime, the Italian Government had proposed that the production and traffic in the Indian hemp drugs be included as part of the programme of the conference.

It was stated above that the delegates to the International Opium Commission which met at Shanghai in February, 1909, felt on the whole that the conclusions of the commission as embodied in its resolutions would be only moral in their effect unless by subsequent agreement amongst the interested states the resolutions and their necessary consequences were converted to and given the force of international law and agreement. This, too, undoubtedly was the popular estimate of the work of the commission. Soon, however, this conclusion had to be modified, for within a few months from the adjournment of the commission several of the Powers more particularly interested gave the resolutions of the commission a binding effect by legislating in accord with them. This was notably true of the British Indian Government, of the governments of the British self-governing colonies and of several of the Crown Colonies; also of the French colonial governments. These actions were in accord with modern state-craft which recognizes that moral conclusions unanimously arrived at by an authoritative international body of wide representation have nearly the force of distinct pledges entered into by a conference composed of delegates clothed with the full power of their states.

In former articles dealing with the International Opium Commission there was outlined the opium problem as seen in the home territories and possessions of the governments represented in the commission, and an account was given of the different measures taken by the different governments to put new restrictive or prohibitory opium laws into effect before the commission assembled. The same plan will be followed in the present paper.

CHINA

The first resolution of the Shanghai Commission is as follows:

That the International Opium Commission recognizes the unswerving sincerity of the Government of China in their efforts to eradicate the production and consumption of Opium throughout the Empire; the increasing body of public opinion among their own subjects by which these efforts are being supported; and the real though unequal progress already made in a task which is one of the greatest magnitude.

It will be noticed at once that though the commissioners at Shanghai recognized the unswerving sincerity of the Chinese Government in its attempt to suppress the production and use of opium in China, there was prevalent nevertheless the feeling that China's effort to this end had been unequal. It may be stated that the commission contained many doubting Thomases who could not believe in the ability of the Chinese Government to accomplish the task to which it had set itself, or to fulfill its part of the so-called Ten Year Agreement of 1907. There were a few, however, who believed that the Chinese Government and people had at last been aroused to the truth, that the individual Chinese, as well as his government, could not command the entire respect of those Powers having treaty relations with China until China had shown a capacity to secure the great moral and economic reform in view. It had become only too obvious that China's inertia both at home and abroad was due to the poppy, and that if she had been unsuccessful in some of her dealings with the Western Powers it was not because of any superiority of intelligence on the part of the representatives of those Powers so much as the inability of a number of Chinese metropolitan and provincial officials to efficiently transact business and perform their duties after emerging from an atmosphere of opium smoke.

At the International Opium Commission the Chinese representatives made a strenuous effort to bring under discussion and secure a modification of the Ten Year Agreement between China and Great Britain such as would be more in accord with and more helpful to the Chinese Government in the task before it. There can be no doubt that the strong men at Peking and in the provinces were in hearty sympathy with the efforts of their representatives in the commission; for the commission had no sooner adjourned than the Peking Government renewed its ef-

forts to secure a modification of the Ten Year Agreement. The attitude of the British Government was not unsympathetic, for the world at large had had it from Lord Morley,¹⁰ who was then at the head of the India Office, that Great Britain would meet China more than half-way in the event of her showing a determination and capacity to suppress what was now being generally recognized as the great economic as well as moral obstacle to the advance of the Chinese Government and people. Quite naturally, however, the British Government was loath to make further concessions to China in regard to the Indo-Chinese opium traffic until China had demonstrated beyond peradventure of a doubt her capacity to fulfill her part of a solemn engagement.

China was determined to show the world her latent energy. To this end the authorities at Peking, encouraged by the proposal for an international conference made by the United States, and aided by energetic, enlightened and faithful viceroys in the provinces, renewed their efforts to suppress the cultivation of the poppy and the use of opium in the empire, expecting thereby to secure from Great Britain terms as to the Indian opium trade which would be more helpful. In this they were successful, as will be presently shown.

During the months from the end of February, 1909, to the spring of 1911, there were varying and sometimes contradictory reports from many observers as to what the Chinese Government and people were accomplishing towards the suppression of the production of opium and its abuse in the empire. To those who were watching the situation closely it was seen that decided progress was being made, and that China was more than carrying out her part of the terms of the Ten Year Agreement.

China is so vast a country, with so great a population and such varying local conditions that it would be quite impossible to give in this paper in detail the methods adopted and the results attained by the central and provincial authorities in achieving her reform,¹¹ so that a statement of the case must be based on memoranda compiled from many sources by one of the highest authorities on the question, Mr. Charles D. Tenney, Chinese Secretary of the American Legation at Peking, and one of the

¹⁰ *Vide*, JOURNAL, October, 1909, p. 847.

¹¹ For the important beginnings, *vide*, Edicts, etc., JOURNAL, October, 1909, pp. 828-842.

commissioners for the United States at the International Opium Commission.

Dr. Tenney's conclusions follow:

It is now possible to make a general statement in regard to the progress of the crusade against the growth of the poppy and the production and use of opium in the Chinese Empire. By the agreement with Great Britain in 1907, — the so-called Ten Year Agreement, — China undertook to suppress the growth of the poppy within a period of ten years, by gradual reduction, and Great Britain agreed on her part to reduce the amount of opium exported from India to all countries by one-tenth annually; this agreement was to continue only if after three years China was able to show that she had lived up to her part of the programme.¹² A great moral awakening had occurred in China before this agreement was entered upon. Upon the conclusion of the agreement a remarkable impetus was given to the movement both in government circles and amongst the scholars and gentry throughout the Chinese Empire, and there arose a general determination to suppress entirely and at once the production of native opium without reference to the Ten Year Agreement. The difficulty of dealing with this question in so vast an area as that of the Chinese Empire and through a body of subordinate officials, many of whom are corrupt, must be evident, and the results that have been obtained, though somewhat uneven, are in the aggregate surprising and most gratifying. The evidence of both Chinese and other observers is conclusive that the growth of the poppy has been practically suppressed in the provinces of Manchuria, Chihli, Shantung and all the other central and southern provinces of the empire. In all this part of China other crops have taken the place of the poppy, the latter if found is only in small patches in remote and secluded places. Shansi, Szechuan and Yünnan were the three provinces largely given up to the poppy culture before the new awakening. But on the evidence of many observers practically no poppy has been planted in them this year, and very little was grown last year. There are of course remote spots where the prohibition of cultivation has not been made effective. A consequence of effective prohibition, and diminution in the supply of opium, has caused the price of the drug to advance until it is worth four or five times its

¹² For agreement, *vide*, JOURNAL, October, 1909, p. 835.

normal price, so that the temptation to grow the poppy is strong. This, however, has caused no general relaxation of the prohibitory movement. Up to last year the reports from the two northwest provinces, Shensi and Kansu, were less favorable than from other parts of the empire. The attention of the central government being called, stringent orders were issued that these provinces should fall in line with the rest of the empire. Such reports as are now available indicate that prohibition is generally effective in that region also. In view of the present conditions, it would seem probable that if China enjoyed full sovereign rights as to the control of the importation of foreign or Indian opium, the opium evil might be thoroughly stamped out of the empire in a very short time. So much for the cultivation of the poppy and the production of opium. The present situation in regard to the use of opium is that wealthy Chinese victims of the habit continue to smoke in private, while the poor have been obliged to give it up on account of the high price of the drug and the difficulty of obtaining it. It is gratifying to be able to state that public opium smoking shops have largely disappeared from Chinese towns, and that the use of opium is no longer fashionable; the habit when indulged in is kept as secret as possible. Wonder has been shown that the central government which, seemingly so weak on other lines, has been able to make so marked a showing in carrying out the opium reform. The explanation is that the conscience of the country has been awakened; so that the arbitrary measures taken by officials in many localities against those who have tried to produce opium for the pecuniary profits of the trade, have been supported by general public opinion and by the most influential members of society. It would seem that international justice now demands that China should be allowed to strike off opium from the list of her legalized imports, so that the government may have full control of the situation and be able to carry to a conclusion the reform so well commenced, unhindered by vexatious agreements with other Powers.

This is a review of the situation up to June, 1910.

Another close observer of the Chinese opium reform may be quoted, — namely Sir Alexander Hosie, most learned in Chinese affairs, and one of the commissioners on the part of Great Britain to the International Opium Commission.

Sir Alexander's report was made on behalf of his government, for the final determination as to whether or not China had carried out her part in the tentative period of three years of the Ten Year Agreement. There was little credible doubt as to what would be the conclusion. On June 15, 1911, the British Foreign Office published an official White Paper containing Sir Alexander Hosie's observations. It had been estimated by friendly observers of the opium reform that China had reduced her home production of the drug from sixty to seventy-five per cent. during the three years following the issue of the anti-opium edict in the autumn of 1906. The Hosie report applying only to the five provinces of Shansi, Shensi, Kansu, Yünnan, and Szechuan, — the most important being the latter which used to produce nearly half the opium grown in China, — nearly confirms this estimate.

Sir Alexander Hosie's report on these five provinces is, in brief as follows:

Shansi

There is reason to believe that the poppy has ceased to be cultivated in this province for the last two years.

Shensi

I have not the least hesitation * * * in saying that so far as my personal observations extended, the official claim that there has been a diminution in the cultivation of from sixty to eighty per cent. is excessive. It may be as much as thirty per cent., but it is certainly much under fifty per cent.

Kansu

From what I have seen and heard, the conclusion which I have arrived at in regard to Kansu is that on the whole there has been a reduction in cultivation, and that that reduction amounts to something under twenty-five per cent.

These three provinces, however, are of relatively minor importance from the point of view of opium cultivation. In the province of Shansi, for instance, the production of opium, even on the highest estimate, never exceeded 30,000 piculs (picul = 133½ lbs. avoirdupois). But formerly the situation was entirely different in the province of Szechuan and that of Yünnan. The former was for many years the greatest opium producing province in China, — the production exceeding 200,000 piculs

per annum, and Yünnan always ranked next to Szechuan in point of quantity, and first throughout the empire in point of quality of its opium. The conclusions arrived at by Sir Alexander Hosie in regard to these provinces may be stated in his own words:

Szechuan. As the result of my own personal investigation, extending over thirty-four days' travel overland, and of the testimony of others, I am satisfied that poppy cultivation has * * * been suppressed in Szechuan.

Yünnan. Taking the province of Yünnan as a whole * * * it may, I think, be fairly assumed that the estimated production of sixty thousand piculs—prior to the introduction of the measures is correct. The suppression has been very materially reduced, and I venture to hazard the opinion that the output of 1910 and 1911 will not exceed fifteen thousand piculs. In other words that there has been a reduction of about seventy-five per cent.

Commenting on Sir Alexander Hosie's report, the *London Daily News*, from which the foregoing statement is taken, said: "To appreciate the extent of the miracle (*i. e.*, opium suppression in China), one must resort to analogy. It is as if the tobacco habit had come to an end in Europe a few years after decision to that effect by the Hague Conference."

To accomplish this result the Chinese Government had issued numerous edicts and many regulations to be enforced by the central and provincial authorities. It is impossible to record all of these, but as an evidence of the thorough-going manner and of the high spirit which has animated the major and minor officials of China, attention may be called to the regulations adopted by the official Anti-Opium Commissioners shortly after the adjournment of the International Opium Commission. By these regulations it is provided that Princes Kung and Pu Wai are appointed Anti-Opium Commissioners to revise the regulations for suppressing the practice of opium smoking among the metropolitan and other officials and those who are in government service in the various *yamens*. They make it the duty of superior authorities to detect opium smokers among their underlings and subordinates, and those who have already given up the vice; to keep track of the latter class, and deposit their certificates as to being non-smokers in the Anti-Opium Bureau for inspection and examination, lest they impose upon their superiors. Commissioners are appointed as inspectors of opium smoking, whose sole duty

it is to go about China inspecting and detecting with diligence and care those who are still deep in the opium smoking habit, and those who are ingenious in concealing their vice, it having been discovered that there were many Chinese officials who having abandoned the opium smoking habit, fell into the vice again. It is further provided that should the latter class be detected in this offence, they shall not only be cashiered but never be reinstalled in their official rank. Moreover, no official post is to be given them by any provincial authorities. And then follow the ten regulations providing for the suppression of the opium smoking vice amongst officials.¹³

The above mentioned regulations apply more particularly to officials, but many anti-opium ordinances have been issued which apply to the people at large, — one of the most recent being a part of the new criminal code for China promulgated in January, 1911. This ordinance not only prohibits and proscribes the cultivation of the poppy and the use of opium, but the possession of instruments and apparatus used in connection with opium. In short, to prohibit anything and everything which tends to aid in or encourage the use of opium.¹⁴

Therefore, the Chinese Government having satisfied the British Government not only as to its willingness, but also as to its ability to suppress the production and use of opium,¹⁵ chiefly as the result of Sir Alexander Hosie's report, the two governments entered into a new agreement on May 8, 1911, the essentials of which follow:

1. The British Government recognizing the sincerity of the Chinese Government and their pronounced success in diminishing the production of opium in China during the three years from January 1, 1908, expressed their willingness to continue the arrangement for the unexpired period of seven years on the following conditions:

2. From the 1st of January, 1911, China shall diminish annually for seven years, the production of opium in China in the same proportion as the annual export from India is diminished, until total extinction of the Chinese production in 1917.

¹³ For the full text of the regulations, *vide*, SUPPLEMENT, p. 266.

¹⁴ *Vide*, SUPPLEMENT, p. 273.

¹⁵ For a Chinese estimate of the suppression of opium since 1906, *vide*, table, SUPPLEMENT, p. 276.

3. The Chinese Government having adopted a most rigorous policy for prohibiting the production and the transport of native opium produced in China, the British Government expressed their agreement with this policy and their willingness to give every assistance. With a view to facilitating the continuance of this work, His Majesty's Government agree that the export of opium from India to China shall cease in less than seven years if clear proof is given of the complete suppression of the production of native opium in China.

4. His Majesty's Government also agreed that Indian opium shall not be conveyed into any province in China which can establish by clear evidence that it has effectively suppressed the cultivation and import of native opium produced in China.

5. During the period of the new agreement China shall permit His Majesty's Government to obtain continuous evidence of the diminution of production of native opium by local inquiries and investigation conducted by one or more British officials, accompanied, — if the Chinese Government so desire, — by a Chinese official. The decision of these inspectors as to the extent of the production of native opium in China is to be accepted by both parties to the agreement.

6. By the arrangement of 1907, the British Government agreed to permit China to dispatch an official to India to watch the opium sales, on condition that such official would have no power of interference. His Majesty's Government now agree that the official so dispatched may be present at the packing, as well as at the sale of opium on the same conditions.

7. The Chinese Government undertakes to levy a uniform tax on all opium produced in the Chinese Empire, while the British Government consents to the increase in the present import duty on Indian opium to taels 350 per chest of 100 catties, — such increase to take effect as soon as the Chinese Government levy an equivalent excise tax on all native opium.

8. With a view to assisting China in the suppression of opium, the British Government undertakes that from the year 1911, the Government of India will issue an export permit with a consecutive number for each chest of Indian opium declared for shipment to or for consumption in China. During the year 1911 the number of permits so issued are

not to exceed 30,000, and shall be progressively reduced annually by 5,100 during the remaining six years ending 1917. His Majesty's Government undertakes that each chest of opium for which such permit has been granted, shall be sealed by an official deputed by the Indian Government, in the presence of the Chinese official if so requested.

9. Both parties agree that should it appear on subsequent experience desirable at any time during the unexpired portion of seven years to modify the agreement, or any part thereof, it may be revised by mutual consent.

The agreement of 1911 has an annex providing for the release into China of some thousands of chests of opium held by traders. But the number of these chests are to be deducted from the annual exportation of 5,100 from India, the chests permitted by the agreement of 1907 and by the later agreement.¹⁶

The agreement of 1907 between Great Britain and China, and the modification of that agreement of May 8, 1911, just outlined, is perhaps the finest example of the comity of nations recorded in modern times. After a controversy sustained for over one hundred years, both parties to the Indo-Chinese opium trade have now determined upon its gradual and effective suppression, and one of them — China — has agreed, and has so far most effectively carried out the agreement, to suppress an internal production of opium seven times greater than the foreign traffic in the drug.

When the International Opium Conference assembled at The Hague on the first of last December, representatives of the British and Chinese Governments were at last able to look one another in the face and without reserve show the representatives of the other governments that a great reconciliation had taken place.¹⁷

The Manchus have gone, but not before their distinguished representative at the Conference¹⁸ had signed on their behalf the International Opium Convention, which confirms to China on the part of the other

¹⁶ For full text of the agreement, *vide*, SUPPLEMENT to this JOURNAL for October, 1911, p. 238.

¹⁷ The negotiator-in-chief of the later agreement, on behalf of the British government, was Mr. Max Müller, at one time Counsellor of Embassy at Washington. Mr. Müller was a British representative at The Hague Conference.

¹⁸ Sir Chen Tung Liang Cheng, former Chinese Minister at Washington.

treaty Powers all that was conceded to her by Great Britain by virtue of the agreement of May 8, 1911. It was under Manchu sway that the Indo-Chinese opium traffic and the vice of opium smoking first seriously appeared in the empire.¹⁹ The early emperors of that dynasty fought against the traffic and its consequences in vain. Under the weakest of the later emperors of this house, the Indo-Chinese opium traffic grew to enormous proportions, and the opium smoking vice took an apparently unrelenting hold of the Chinese people. The traffic became legalized by the Tientsin treaties, and the internal production of opium in China was given free rein. The Manchus were not to depart ingloriously, however, for there was the old Buddha who came to recognize the economic and moral degradation that was attendant on the opium vice. In the latter years of her reign there was a revival by her ministers of the old contest against the Indo-Chinese opium trade, and the opium vice in China. The old Buddha died on the eve of the assembling of the International Opium Commission. Under her successors and the statesmen who served them the latest great acts of the contest were accomplished by the signing of the Anglo-Chinese agreement of last year, and of the International Opium Convention of January 23.

GREAT BRITAIN

Since the adjournment of the International Opium Commission, Great Britain has set a splendid example in the putting of an end to the unnecessary production, traffic in and use of opium and other narcotics. Her recent agreement with China in regard to the Indo-Chinese opium traffic has been mentioned at length, but in addition to that special agreement other actions have been taken by the London and the Colonial governments which are of international significance.

For instance, the International Opium Commission had no sooner dispersed than the Crown Colony of Hong-Kong adopted the principle of Resolution 4 of that commission,²⁰ and immediately prohibited the export of opium to countries prohibiting its entry, while in the summer of 1911 Sir Edward Grey informed the interested governments that India

¹⁹ See Edict of the Receiver General of the Customs at Canton, SUPPLEMENT, p. 264.

²⁰ *Vide*, SUPPLEMENT, July, 1909, p. 276

would, quite independently of the prospective conference, forbid the exportation of opium to countries which prohibited or desired to prohibit its entry. Moreover the anti-narcotic laws of Great Britain were strengthened and a compulsory declaration of all importations and exportations of morphine and cocaine was put in force.

In the Crown Colonies of Wei-hai-wei and Ceylon, where the number of opium consumers is small and the population more or less stable, it was found possible to institute a system for the registration of smokers of opium which is to be used for the gradual obliteration of opium consumption, whereas in Hong-Kong and the Malay Peninsula, where the Chinese population fluctuates and fresh immigrants are constantly arriving, the registration was not found to be practicable. As an illustration of what has been done in these Crown Colonies, Ceylon and Hong-Kong may be taken as illustrations.

The situation in Ceylon was somewhat peculiar. Besides those persons who were habitual consumers of opium, the *vederalas* or native doctors who are trained in the traditional Ceylonese system of medicine, habitually used opium in their prescriptions. Some difficulty, therefore, was encountered in the settlement of the question of what persons professing to be *vederalas* had any claim to knowledge of ancient medical tradition. The matter was, however, decided by careful inquiry, and those persons who were found to be qualified *vederalas* were registered and are now entitled to use opium in treating their patients.

An ordinance which came into force on the first of October, 1910, regulates the general opium traffic. The right of importing opium, whether raw or prepared, is vested solely in the government, and is delegated to the principal medical officer who has charge of the distribution of the drug. Opium, for purely medicinal purposes, may be supplied by the principal civil medical officer to qualified medical men and veterinary surgeons and to registered *vederalas*. It can only be supplied to other persons on their registration as habitual consumers. No person may be registered except on production of satisfactory evidence that at the time when the ordinance was passed he was an habitual consumer, together with evidence of the amount of opium which he was accustomed to consume and the manner and form of consumption. Thus, the opium consumers in Ceylon are at the present moment a definite number, to

which additions cannot be made. The use of the drug, except for medicinal purposes, must therefore disappear in the course of time. Further precautions against undue use of the drug are taken by limiting the annual amount allowed to a registered consumer or *vederala* to eight ounces. The importation, possession or sale of opium except by the authorized officer, — the principal civil medical officer, — and for the purposes described above, is illegal.

In Hong-Kong it has not been found practicable to take the monopoly of the importation, preparation and sale of opium into government hands, but since the adjournment of the International Opium Commission restrictions on the traffic have been made by the limitation of the farmer to a certain number of chests per annum, — 800 in 1911, — by the suppression of the opium divans and by forbidding the sale of prepared opium to any person other than an adult male. The preparation and sale of opium is vested in the farmer,²¹ and raw opium can only be imported by him or by a person possessing a permit signed by a government officer and countersigned by the farmer. By resolution of the legislative council which came into force on the first of September, 1911, the importation of any kind of raw Indian opium is forbidden unless covered by export permits from the Government of India to the effect that it has been declared for shipment to or consumption in China. This resolution does not apply to opium imported by or for the use of the farmer. The resolution of the legislative council just referred to was made to effectuate Article 8 of the Indo-Chinese agreement of May 8, 1911.²² Hong-Kong has gone further and has forbidden the exportation of prepared opium or of dross opium, — that is a preparation of opium in which the residue of opium which has been smoked forms the main ingredient, — to China, French Indo-China, the United States, the Philippine Islands, the Netherlands, Indies, Siam and Japan, while the exportation of opium to those places which permit its importation can only be carried out with the written permission of the Superintendent of Imports and Exports.

The British self-governing colonies have not lagged in the forward movement set by the mother country and its Crown Colonies. The

²¹ Generally a Chinese.

²² *Vide, supra*, p. 879.

Government of New Zealand, which had prohibited by law the importation of opium in any form suitable for smoking, added a further restriction by Statute No. 30, of 1910, which enacts that opium in any form, which, though not suitable for smoking, may yet be made suitable, may only be imported by permit issued by the Minister of Customs.

Canadian legislation of 1908 declared the importation, manufacture, sale or possession for sale, of opium for other than medicinal purposes, or of opium prepared for smoking, to be an indictable offense. By Act No. 17, of 1911, the law as to opium, cocaine, morphine, etc., is made more stringent. The importation, manufacture, sale, possession or offering for sale or traffic in Canada in these drugs, except for scientific or medicinal purposes, is a criminal offense. The smoking of opium, the possession of opium prepared or in preparation for smoking, and frequenting of opium dens are criminal offenses, while the exportation without lawful excuse of any of the drugs to any country which prohibits their entry is punishable by a fine, or imprisonment, or both.

It may be stated that the author of the admirable Canadian law was the Honorable Mackenzie King, Minister of Labor in the late Liberal Cabinet. As a profound student of labor conditions in the Far East, as well as in Europe and America, he has lent the whole weight of his authority and knowledge to the suppression of the opium vice in Canada, and the law for which he was responsible was in part designed to enable the United States to protect its northern border from smuggled opium. It is an excellent example of the assistance which Canada and the United States may render each other in a great moral and economic cause, but which so far in this case has only been rendered by Canada.

The Governments of Australia and the Transvaal have strengthened laws which were in existence four years ago, and by these laws the use of opium and allied drugs, except for medicinal purposes, has been reduced to a minimum.

It has been stated above that the British Government laid particular emphasis on the morphine and cocaine questions on accepting the American proposal for an International Opium Conference. This emphasis was based on the necessity of the situation and on action which had been taken in British Oriental possessions to prevent the opium habit being substituted by the morphine and cocaine habits. There were pre-

vious restrictions on the importation and sale of morphine and cocaine in the Eastern Colonies and Protected States, but since the meeting of the International Opium Commission the legislation on the subject has been amended so as to impose greater restrictions, and it may be said that the morphine and cocaine laws of the Eastern Crown Colonies and Protected States are noteworthy examples of restrictive legislation, and will become wholly effective when the sources of supply of these drugs in Germany, France, Great Britain and the United States are under efficient control, as provided for in the International Opium Convention.

The British Government was not only concerned about the morphine traffic from Europe to its own colonies and possessions, but also to China, where the use of this drug and cocaine threatened to supplant opium. A quotation from the address of the Honorable Murray Stuart, of the Hong-Kong Government, is of interest in this connection. On October 29, 1910, Mr. Stuart pointed out that two years before public attention had been drawn very emphatically to the increased consumption of morphia in China, although the Chinese customs statistics seemed to prove the contrary. For, whereas they showed in 1902 an import of morphia into China of 195 odd pounds, only 120 ounces were shown for 1904. Yet everybody knew that during the six previous years the increase in the consumption of morphia in China had been truly enormous. Morphia was being smuggled into China under some other name. When the anti-opium movement in China reached the stage at which the Chinese Government threatened all opium smokers with heavy fines and penalties if they persisted in continuing the habit, there arose throughout the land a demand for an opium cure. An anti-opium pill made its appearance on the market, and an enormous demand for this antidote set in. But the cure proved to be simply another form of taking the drug. These pills, on being subjected to analysis, were found to contain no antidotal drug, no stimulant or scientific ingredients, but simply morphia made into a tabloid with ordinary household flour. Some time before Mr. Stuart had asked the Legislative Council for information as to the amount of morphine and compounds of opium imported into Hong-Kong. The answer given by the government was that between the first of March and 30th of September, 1910, over seven thousand pounds of morphine were imported into the colony, the whole amount being shipped

from London. It was very easy for Mr. Stuart to point out that, with a great show of virtue, the London Government had insisted on the colony marching in line with China in the suppression of opium smoking to the extent of a large sacrifice of public revenue, and all the while the export of opium from England to China in the more deadly form, morphine, was permitted to flourish and increase, and he asked the Council to pass a resolution humbly praying the Secretary of State for the Colonies to lay before the Parliament the propriety of assisting the Government of Hong-Kong in its endeavors to discourage the opium vice in its most injurious form by restricting the export from England of the means — morphia — of gratifying it. On a later page it will be shown that the International Opium Convention contains the means whereby the exportation of morphine in unnecessary quantities will be brought to a stop.

In British India, official opinion still leans to the view that opium eating is on the whole not injurious to those members of the Indian population who practice it. The vast majority of medical men hold the contrary view; but it will be some time before that view prevails. Meantime the Indian Government is strengthening its laws so as to confine the habit and keep it in channels which they regard as legitimate. But the considerations which have caused the Government of India to regard a certain amount of opium eating as legitimate in present circumstances do not apply to the smoking habit, which has never taken root in the country, and is strongly condemned by public opinion. The Indian Government have therefore endeavored for a good many years past to reduce it to a minimum by repressive action. Thus, while some twenty years ago there were some six hundred shops for the sale of smoking preparations, the sale of such preparations was subsequently and still remains absolutely prohibited. Vigorous measures are enforced by the police and the excise preventive service for punishing infractions of the law, such as are occasionally attempted in large and metropolitan centers like Calcutta and Rangoon.

It will be seen from what has been stated under this heading that Great Britain had not only acted on the results of the International Opium Commission up to the time the Hague Conference assembled, but was prepared to go to the fullest extent in coöperation with the other governments to make the conclusions of that commission effective.

ITALY

Italy is one of those happy countries in which the opium vice in any form does not exist, and despite the fact that the Italian Government has little material interest in the opium question, it has nevertheless continued to coöperate with the other governments in the international phases of the question.

GERMANY

The German Imperial and State laws in regard to opium and its allies are all that can be desired, and are effectively enforced. This may also be said of the German Colonies and Protectorates. In Kiaochou, on the China coast, steps have been taken which mark the sincere desire of the German Government to coöperate with the Chinese in stamping out the opium vice. But to Germany the morphine and cocaine questions are serious, — not because of any abuse of these drugs in German territory, but because of the large financial investment in their manufacture. When the British proposals in regard to morphine and cocaine were made to the United States it was thought that the large German interest in the manufacture and export of these drugs would interfere to prevent German coöperation with the United States for their control. But this proved to be unwise thinking, and it will be shown later that Germany, by virtue of the International Opium Convention, stands ready with the other Powers to solve this problem, even at considerable financial sacrifice on the part of her manufacturers and exporters.

HOLLAND

The immediate concern of the Netherlands Government in opium is that a considerable revenue is derived by the Netherlands Indies Government from the importation, manufacture and distribution of opium for smoking purposes; but it has been the high endeavor of both the home government and the governments of the East Indian islands to ultimately abolish the pernicious habit amongst the natives. Since the adjournment of the International Opium Commission, many ordinances have been passed by the Batavia Government aimed to extend government control over the habit of opium smoking, and this has so far suc-

ceeded that the Netherlands Government and people look forward to the obliteration of the habit in the near future. No doubt there will be many difficulties to meet, as the net revenue from the opium régime last year was in the neighborhood of eighteen million florins. But that this revenue will shortly be abandoned in favor of a more legitimate revenue is clearly evidenced by the hearty coöperation which has been extended by the Netherlands to the United States in its endeavor to secure international agreement on the opium problem.

PERSIA

Of Persia, it may be said, in addition to what was stated on page 664 of the JOURNAL for July, 1909, that early in 1911 the Persian Government enacted legislation aimed to abolish opium smoking and other misuses of opium in Persia.

PORTUGAL

Although in Portugal itself there is no abuse of opium, its colony of Macau on the China coast still continues to import large quantities of the drug, manufacture it into smoking opium, which is used locally, or exported for revenue purposes. This opium, however, has been practically outlawed by every country a party to the International Opium Convention, and by the provisions of that convention the trade should be speedily ended.

RUSSIA AND JAPAN

Russia fortunately has no opium problem, nor has Japan except in the Island of Formosa, where an opium régime exists for the avowed purpose of finally suppressing the opium vice.

SIAM

Although no opium is produced in Siam, large quantities are imported and manufactured into smoking opium under a system of government monopoly for the use of Chinese resident in that country. But it is the purpose of the Siamese Government to gradually extinguish the vice, and ordinances aimed to this end have been passed since the adjournment of the International Opium Commission. The Siamese Govern-

ment also purposes legislation for the control by the Siamese Government over the amount of morphine and cocaine which may be imported, and the rendering of account by sellers showing that they have disposed of their supplies in a legitimate manner.

FRANCE

Since the adjournment of the International Opium Commission, French public opinion has been aroused on the question of the abuse of opium and morphine in the large seaports of that country, and the government is making strong efforts to root out the evil. In French Indo-China the government has control. It has taken strong measures to bring to an end the abuse of opium in the colonies, and it is earnestly believed that in a short time the abuse of opium will be reduced to a minimum. Further, the French Indo-Chinese Government has forbidden the exportation of opium prepared for smoking to those countries which prohibit its entry.

Upon the above summaries, it may be repeated that the resolutions of the International Opium Commission were more than moral in their effect. They created sufficient energy to enable the governments concerned to enact practical, effective legislation. The United States is the exception, as will be shown later. With these preliminaries we may now pass to the International Opium Conference and its results.

HAMILTON WRIGHT.

[To be concluded in the next number.]

THE LAW OF NATIONS *

After the Reformation, when Europe divided itself into a number of separate states, each claiming to be an independent nation, the necessary contacts between them led to frequent wars. The question arose how to bring about a concert of action between them, which should result in peace and order. All that could be done by agreement was done. But it was clear that peace and order were constantly imperilled so long as the settlement of the questions constantly arising out of these necessary contacts was dependent upon treaties, because at any time on slight pretext these might be rescinded. It was perceived that the only assurance of peace and order among nations, as among individuals, lay in the establishment of a law governing the actions and relations of the nations. Publicists therefore set themselves to the task of formulating and establishing such a law.

In laying the foundations, they naturally looked to the great political concepts of their past and present. First, there was the original Roman Empire, which had expressed itself through the civil law. The political principle of that empire was that, though all power was theoretically vested in all the people of the empire regarded as a single political society, the whole society had delegated all its power to the Emperor, who, through organs selected theoretically by himself, imposed law, as a supreme political personality representing the whole empire, upon all the persons and bodies politic and corporate within the empire. Second, there was the Christian society of the early Church which based itself upon the teaching of Christ and the Apostles, and which was in part theocratic and in part democratic and republican. This society included all professing Christians regardless of the political jurisdiction in which each found himself; it exercised no political control over its members, but only a spiritual oversight of them. Third, there was the Holy Roman

* Printed, with permission, from the original manuscript of an article which appeared in a French translation in the May-June, 1912, number of the *Revue Générale de Droit International Public*, pp. 309-318.

Empire, which expressed itself in part through political compacts between the component states, and in part through the canon law. Its principle was that the various great communities of Continental Europe, as independent states, had delegated power for the common purposes to the Emperor and Diet, subject to a moral or quasi-legal control by the Papacy for the protection of the individual as a member of the Church; the Emperor and Diet, and the Papacy, thus constituting a dual federal head, for the common political purposes and for establishing uniformity in religious practice, of a federation composed of the states of Continental Europe — the British Islands remaining outside the federation and the states of Northern Europe participating in it in a half-hearted manner. To these conceptions of an organized society regardless of or inclusive of states and superior to states and persons for all or some purposes, was opposed the conception, which became prevalent after the Treaty of Westphalia, of the civilized world as composed of a body of states wholly independent and only morally bound by such agreements as they might choose to make, for such time as they might choose to keep them; or at least so far independent as to be subject in their external relations to no law except that of natural reason and justice, each one interpreting this natural reason and justice according to its own ideas.

Out of these various conceptions, the publicists of the Reformation evolved what they called the law of nations, based in part upon the *jus gentium* of the original Roman Empire, in part upon the federal law of the Holy Roman Empire, and in part upon history and precedent; and what they called "the law of nature," based in part upon the *lex naturæ* of the lawyers of the original Roman Empire, — which was based on reason and conscience, — and in part upon the moral and political philosophy of Christ and the Apostles.

The weakness of the argument of the publicists of the Reformation lay in the fact that they were unable to point out any inclusive organized society or any other personality as the law-giver for the nations. The Reformation was partly political and partly religious. As a political movement, it had for its object the dethronement of the Emperor and the Pope as the dual government of a political society which included most of the civilized world. Upon their dethronement, this inclusive society disintegrated. The old system was so unpopular that no attempt

was made to reorganize the society of the European states under a new and better form of government. The world had not advanced to a point where this was possible. The only conception of a society inclusive of and superior to the nations which remained after the Reformation was that which Christ had announced. But this was spiritual, not political; and it was universal, not European. Though the Christian philosophy thus kept alive the idea of an all-inclusive society as the law-giver of the nations, it afforded no basis for a practical realization of such a society as a political fact.

Because the publicists of the Reformation were thus unable to point to a law-giving personality for the nations, they failed to show the existence of a law governing the nations. They and their successors, however, succeeded in convincing the world that such a law ought to exist and that it was practicable to formulate it. Nations began in fact to abide by and enforce some of the principles formulated by the publicists, but each nation continued to insist that it was its own law-giver. There were thus certain points of agreement between the nations which had some outward semblance to laws governing the nations. In 1780 Jeremy Bentham invented the expression "international law,"¹ which so nearly expressed the existing fact that it was soon seized upon by politicians and publicists and came into general, though not universal, use.

As we are now able to see, the term "international law" is self-contradictory and therefore unscientific. That which is international cannot be law; or, what is the same thing, that which is law cannot be international. Agreements, relationships, commerce may exist between nations and thus be international; but law can never so exist. Law always and inevitably comes from above. Morality may come from above or from within. Agreements are related to law only as one of the means of establishing law. An agreement permanently to observe a rule in a specified set of circumstances establishes the rule as a law between the agreeing parties; but the rule is the law, not the agreement; and if the principle agreed upon be a true principle of justice, the agreement establishing the rule is justly irrevocable, and is *functus officio* as soon as made. The only adjective which can appropriately be used with "law" to express the idea of a law governing the nations is therefore "suprana-

¹ This expression was used in his essay on *The Principles of Morals and Education*.

tional" or "supernational."² Whether the law governing nations be established by agreement or by force, it comes from above, and there exists a human law-giver. Who or what is this human law-giver as respects the nations? In the light of recent study of the science of jurisprudence, this question may, it would seem, easily be answered.

It is now agreed that law, in the sense of the science of jurisprudence, emanates from a political society, and is imposed by that society upon the members. Law, in this sense — which is the sense we are considering — is a body of rules imposed by a society upon its members. Until quite recently scholars have fallen into the error of confusing the organs of the society with the society itself — the agent with the principal. Because the parliament, the congress, the emperor, the king, the president, the courts, the subordinate officials, the shifting majority of electors or voters, actually do the work of governing, we regard them as law-givers; whereas they are merely the organs of the society, and the whole society, of which they are organs and agents, is the real law-giver.

² In an article on "The Primary Sources of International Obligations" printed in the *Proceedings of the Fifth Annual Meeting of the American Society of International Law, held at Washington, D. C., April 27-29, 1911*, pp. 280-289, Professor William L. Hull suggested a distinction between "the law of nations, or extranational law; the law between nations, or international law; and the law over nations, or supranational law." Extranational law he defined as "a composite photograph [or] an amalgamation of national interpretations of international law"; international law as "a collection of the rules in force between pairs or groups of nations;" and supranational law as "a body of law so universal in scope, so expressive of the genius of the family of nations as a whole, that it may serve as a basis for a genuine international court of justice." The terms "extranational law" and "international law," as defined by Professor Hull, seem to the author to be incorrect, since "law," in the sense in which that word is used in the science of jurisprudence, always comes from "above" persons or nations — not merely from "outside" of them, and not at all from "between" them. "Supranational law," as thus defined by him, seems to the author to be indefinite. "Supranational law," (or "supernational law,") in the sense in which that expression is used by the author, is "the federal law of the society of nations;" regarding which, see an article by the author, in the same volume with that of Professor Hull, pp. 320-337, entitled "The Proposed Codification of International Law and the Relation of Codification to the Proposed Establishment of a Supreme International Court of Arbitral Justice." Professor Hull interprets his definition of "supranational law" in this sense. He regards supranational law as the law of "the Family of Nations," and draws an analogy between this law and "the law which was brought into existence [in 1789] for that new entity termed 'The United States of America.'" See his article, p. 281.

Thus when two or more nations agree to apply a certain principle in a specified class of cases, they together constitute for this purpose a single society, of which they act as organs, and the principle established becomes a law of the society and is enforced by the society.

All law governing nations therefore is imposed upon the separate nations by a society of peoples and nations which may include all or a part of them, and which is above and superior to each of them.

This idea of a political society composed of all the peoples and nations, which is a law-giver for the nations, is but an enlargement of conceptions which are common among us. Great states and empires exist which are composed of states, and in which the whole society acts as a law-giver for the component units to the extent necessary in the common interests. The United States and the British Empire are examples of such societies. The latter includes nations of every variety of race, civilization and creed. The expression "the society of nations," as a term signifying the political society composed of all the peoples and nations, or of all the civilized peoples and nations, is coming into common use. Professor Westlake asserts³ that what is usually called international law is the law of the society of nations. It is, we venture to assert, not going beyond the fact to say that at the present moment, the nations and peoples of the world are, by agreements, by commerce, by relationships, indissolubly and federally united, so that they together constitute a body politic and corporate, which is the law-giving personality above the nations.

But this will no doubt be at first denied, and it will be urged that the society of nations is only an imaginary body politic and corporate. Before it can become a fact, it will be said, it must be created as an institution among men, its functions must be defined and it must be provided with suitable officials and organs by which to express itself.

As respects the first objection, it may be answered that a corporation need not be created by express action of the state or of the persons or political units composing it, and that a body politic or corporate may exist by being recognized as a corporation by a given state or by society at large. In the same manner, an inclusive political society having states and their peoples as its component units need not necessarily arise by

³ *International Law*, by John Westlake, Part I, Peace, ed. 1910, p. 1.

the process of creation or through express agreement of the component units, but may exist through their recognition of themselves as forming such an inclusive society. The truth seems to be that the society of nations exists by the recognition of the nations and of the people of the nations — that is by the recognition of society at large.

As respects the second objection, the powers of the society of nations regarded as a political corporation are defined by the circumstances of the case and by the needs of the situation. There is no need for the nations to submit themselves to any law-giving personality as respects their strictly internal and domestic affairs. Experience has shown that civilization is advanced by the nations exercising all functions in this respect. The only need, in the interests of civilization, is, that there should exist a law-giving personality as respects those matters which are common to all or which are beyond the competency of any one. The powers of the society of nations as a law-giver for the nations are therefore limited by the necessity and propriety in the case, to those which are needful in order that those matters which are common to all may be disposed and regulated according to a common plan for the benefit of all, and in order that those matters may be adjusted which concern more than one and less than all the nations, and which are therefore beyond the competency of any one of them to decide. In a word, the society of nations is by the nature of the case a federal body politic and corporate, and its central government, if one can be said to exist, is a federal government as respects the nations, and exercises the usual powers of such a government.

In reply to the third objection, that there are no officials or organs of the federal government of the society of nations, it may be said that if this were true, it would not be fatal. A corporation may exist without officers, and a body politic may exist without a government or under a provisional government. When there is no designated governing body, the powers of the corporation or nation revert to the whole membership of the corporation or nation, who may designate their officials and divide among them the powers of the corporation. The designation of a governing body is thus wholly a matter of convenience. If it be more convenient under any given circumstances for a corporation or a body politic to manage its affairs otherwise than through a governing body

specially designated, or through a provisional government pending the establishment of a permanent government, it is competent for it so to do.

It appears to be the case that it is more convenient under present circumstances that the federal government of the society of nations should not be placed in charge of a specially designated and authorized governing body and that the federal powers should be exercised by or under the supervision of the nations themselves as the ultimate federal government, in such manner that the rights of the minority may be respected. As has been said, when certain of the nations through treaties or conventions, agree to establish a rule between them based on principles of justice, they are acting as the organs and officials of the society of nations and as its federal government to a certain extent, and are respecting the rights of the minority by not enforcing the rule except between the agreeing nations. A specially designated and authorized governing body could hardly be based on any other than the representative principle, and whether the basis of representation were wealth or population, or both, the majority of the representatives would necessarily rule. Experience has proved that the representative principle is applicable only among homogeneous populations of high civilization inhabiting a territory all parts of which are contiguous. Nations and peoples which though homogeneous are of low civilization, or which are heterogeneous in race or creed, or which are of varying degrees of civilization, or which inhabit regions separate from each other, must effect their common ends and must adjust those disputes in which more than one and less than all are concerned, through some species of government, — informal or even formless almost though it may be, — whereby the local circumstances of each may receive due consideration and whereby the danger of a majority which is in fact a political coalition seeking control and aggrandizement may be averted. The society of nations, regarded as a political society, is composed of heterogeneous and separated nations and peoples, and its government must therefore be so constituted and carried on that all danger of majority rule may be avoided and opportunity be given for each nation or any minority of the nations to take such measures and abide by such rules as it or they may deem necessary for self-protection and self-preservation and for the common welfare of

all. Such a federal government of the society of nations does, we venture to assert, exist.

Before attempting, however, to describe this government, it will be desirable to notice, first, that the society of nations, regarded as a federal body politic, is of what may be called the mixed form. The study of the science of government has shown that there are two general classes of federal bodies politic — one in which the component states or the whole people designate individuals who collectively constitute the federal government, and the other in which one of the states or a group of them constitute the federal government or control the designation of the individuals who constitute such government. The society of nations appears to partake somewhat of the nature of each of these forms. Such gatherings as the Hague Conferences have some resemblances to a federal government on representative principles, though such conferences are only advisory; yet as matter of fact, the supernational law of the world is made principally through the persuasive hegemony of the group of nations which we call "the great Powers."

It will be desirable, also, to bear in mind that, as the result of recent study of jurisprudence, it has been shown that all government, whether the form of the body politic be unitary or federal, involves the performance of two and only two functions — the formulation of laws and the enforcement of them. Law, in the sense of the science of jurisprudence, as has been said, emanates from a political society, and is imposed by the society upon its members: but law does not exist until it is formulated by the society and it is in a state of suspended animation unless it is enforced in the cases to which it is applicable.

Lastly, it will be necessary to remind ourselves that though we may think and speak of nations or other corporations as forming a government of an inclusive society, just as we may think and speak of a corporation composed of corporations, nations and corporations are, after all, bodies of persons, and our enquiry resolves itself in the last analysis into a search for the persons who formulate and enforce the law of the nation or corporation which we are considering.

Who, then, are the persons who, in behalf of the society of nations and as its federal government, formulate and enforce the federal law of the society, which we call international law, but which we should, it would

seem, call the supernational law? Those who formulate the law are clearly the publicists, the members of embassies and legations, the members of the foreign departments, the members of councils and senates who pass upon the ratification of treaties, and the members of the national legislatures who, in the last resort, pass upon great conventions between the nations and determine the foreign policy of each nation. These officials act, we may believe, as a general rule, not merely in the interests of their own nations, but in the interests of the peace and order of the world. The law-enforcing officers of the society of nations we find among the executives of the nations acting both in their civil and in their military capacity. Rarely can there be found a national executive who does not, when attempting to wield the power of his nation against other nations, consider the interests of the rest of the world as well as those of his own nation, or at least attempt to do so. The military and naval officers of to-day, familiar with the whole world, seek to make their national flags emblems of civilization, and to use the engines of destruction only that obstacles to progress and illumination may be removed: and victorious soldiers are often sympathetic teachers and guides of the vanquished. When civilized nations seek to impose their judgments upon countries external to them, they more and more tend to justify their action, in the eyes of the nations; attempting to show, by reason and argument, that the action in question is necessitated in the interests of the common welfare as well as in their own interests.

But it may be said that all this is fanciful, — that the case for supernational law has not been made out — that it is well not to change an old expression like "international law" which has served a good purpose, self-contradictory though this term may be — that the compromise which was good enough for our fathers ought to be good enough for us.

But all compromises regarding matters which are of constant occurrence are in the nature of things temporary. By the process of evolution a point is certain ultimately to be reached where a definite decision of the question has to be made. That point has, it would seem, been reached as respects the law governing the nations. The common juridical sentiment — to use the expression of Rivier — has now evolved to the point where it is no longer satisfied with a law purporting to govern the nations which in the last analysis is no law at all but merely an agreement be-

tween certain of them. The meaning of law is now clearly understood, and it is also understood that there is no reason why nations, like other persons and corporations, should not be subject to law. There is no desire that the nations should yield their rights of self-preservation or self-protection. As respects the language in which supernational law shall be formulated and as respects the manner of its enforcement, the nations are regarded by the common juridical sentiment as the safest judges. But there is a growing insistence that there shall be a true supernational law, to the extent that such a law is possible consistently with national self-preservation and self-protection. Judicial, not political, settlement of international disputes is earnestly advocated by the leading statesmen of the world, in so far as such settlement is possible without destroying the nations. The demand for a supreme court of the society of nations to supplement the present international arbitral tribunal, leaving to the arbitral tribunal the function of settling questions which are of a nature to be settled by political compromise rather than by judicial decision, becomes more and more pressing.

It seems, therefore, that the time has come when supernational law must supplant that which is called "international law." Out of regard for the national rights of self-preservation and self-protection, we must proceed cautiously in working out details, and objections of nations to submit their disputes under a law admittedly supernational should be viewed leniently; for a supernational law will destroy itself if it destroys the nations. As a true supernational law must protect and preserve the nations as well as regulate them in the common interests, it is consistent with such a law that the nations should decline to submit to judicial settlement any questions, which, if decided adversely to them, would result in their destruction. Indeed, when the supernational law is finally formulated, it must of necessity, as it will in fact be the federal law of the society of nations, itself exclude from judicial consideration questions which involve the self-protection or self-preservation of any nation. But even when such questions are excluded, the scope of supernational law is wide.

The acceptance of "the federation of the world" as an existing fact does not necessarily involve a belief in the ultimate evolution of a "parliament of man." Formulation of laws by parliaments involves the rule

of the majority. Majority rule is just only when the members of the minority have equal opportunity with the members of the majority to convert a minority into a majority. When the majority is fixed and certain, majority rule is permanent domination of the minority by the majority. Moreover, majority rule is just only when each representative understands the local conditions and circumstances of all the communities represented. Ignorance of the majority may result in its permanent imposition of unjust rules upon the minority. In the society of nations there is always danger that a majority may, through ignorance of local conditions, impose unjust laws upon a minority. Those who accept the idea that the society of nations is an existing fact and that it is the law-giver of a law which governs the nations and regulates them in their common purposes, are in reason forced to believe only that the existing federal government of the society of nations will continue to evolve along its present lines. They will not seek to abolish the present federal government and to establish in place of it a "parliament of man," but will endeavor by investigation and study to invent improvements in the existing federal government, so that it may more and more perfectly formulate and enforce the supernational law, while preserving all the nations and protecting the minority of them from being permanently dominated or ignorantly imposed upon by the majority.

ALPHEUS HENRY SNOW.

NOTES ON RIVERS AS BOUNDARIES

1. PRELIMINARY

In the middle ages rivers which separated alien peoples or tribes were looked upon as neutral barriers rather than areas susceptible of nice division and capable of ownership.¹ There gradually arose, however, a sense of the necessity for the assertion of control over such waters; but there was confusion of thought as to the nature and extent of that control. Rivers served as natural arteries of commerce as well as natural boundaries. The matter of navigation was of as great moment as that of territorial limits. For that reason, early writers announced the principle of co-dominion, which assigned to the opposite riparian proprietors rights of sovereignty over the entire stream.² Men found it difficult to reconcile the claim of exclusive sovereignty asserted by one state over any portion of the stream, with the claim of another to exercise rights of navigation therein. No doubt the latter claim had a marked effect upon the scope of the former. Nevertheless, rights of navigation were not decisive of the problem whether a line of division might be drawn through the waters of a river in recognition of exclusive sovereign rights of the states on either side thereof. It came to be understood that such a line could be drawn. In accordance with the views of Grotius and Vattel, nations were agreed that it should pass through the middle of the stream.³ This method of division proved, however, to be unsatisfactory in the case of navigable rivers; for, in disregarding the course of the principal channel, it was likewise heedless of the equities of the state that happened to be the more remote therefrom.⁴ Nor did it adapt itself to gradual changes which such channel might undergo. As a result, at the beginning of the nineteenth century, riparian states began to conclude

¹ See historical review by E. Nys, in his *Le Droit International*, I, 423-437, citing at 424, H. Helmolt, in the *Historisches Jahrbuch*, 1896, pp. 235 et seq.

² *Ibid.*, I, 425.

³ Campbell's Grotius, Chapter III, §§ 7 and 8; Chitty's Vattel (1859), Chapter XXII, § 266, p. 120.

⁴ See E. Engelhardt, *Du Régime Conventionnel des Fleuves Internationaux*, 73.

treaties which proposed a different method of division and which has since become the accepted mode of indicating the frontier.⁵

2. THALWEG

It has long been agreed that, when a navigable river forms the boundary between two states, the dividing line follows the *thalweg* of the stream.⁶ The *thalweg*, as the derivation of the term indicates, is the

⁵ See Article 6 of Treaty of Luneville, February 9, 1801, De Clercq, *Traité de la France*, I, 426, following the views by the French plenipotentiaries expressed at the Congress of Rastadt in March and April, 1798.

⁶ Numerous treaties since the beginning of the nineteenth century make express provision that the frontier along navigable rivers shall follow the *thalweg*. See, for example, Art. V of the definitive treaty between France and the Allies of May 30, 1814, Brit. & For. State Pap. I, Pt. I, 156; also collection of treaties containing similar provisions in the Argument of the United States in the Chamizal Arbitration (Washington, 1911) 10-21. Among recent conventions to the same effect may be noted that between the Argentine Republic and Brazil of October 6, 1898, Brit. & For. State Pap., XC, 85; also that between Great Britain and France of June 14, 1898, for the delimitation of possessions west of the Niger, Brit. & For. State Pap., XCI, 38, 45.

The treaties of the United States concerning river boundaries lack uniformity of expression. Article II of the definitive treaty of peace with Great Britain of September 3, 1783, provided that the frontier should follow the "middle" of boundary rivers as well as of water communications between the lakes. (Malloy's Treaties, I, 587.) Article I of the Webster-Ashburton treaty of August 9, 1842, provided that the frontier along the river St. John should follow the "middle of the main channel." (*Id.*, I, 651.) The treaty of April 11, 1908, concerning the Canadian international boundary, provided in Article II, respecting the St. Croix River, that the line should "follow the center of the main channel or *thalweg* as naturally existing, except where such course would change or disturb or conflict with the national character of islands as already established by mutual recognition and acquiescence." (*Id.*, I, 818.) This is the first boundary convention of the United States in which the term *thalweg* was employed.

Article II of the treaty with Spain of October 27, 1795, provided that the boundary along St. Mary's River should follow the "middle thereof;" while Article IV declared that the "western boundary of the United States which separates them from the Spanish colony of Louisiana is the middle of the channel or bed of the river Mississippi." (*Id.*, II, 1641, 1642.) Article III of the treaty with Spain of February 22, 1819, provided that the boundary should follow the "course" of the Red River between specified points, all islands therein being assigned to the United States. (*Id.*, II, 1652-1653.)

Article II of the treaty with Mexico of January 12, 1828, declared that between specified points the boundary should follow the "course" of the Rio Roxo or Red River. (*Id.*, I, 1083.) According to Article V of the treaty of Guadalupe-Hidalgo, of February 2, 1848, the boundary was to proceed up the "middle" of the Rio Grande

downway, or the course followed by vessels of largest tonnage in descending the river.⁷ That course frequently, if not commonly, corresponds with the deepest channel. It may, however, for special reasons take a different path. Wheresoever that may be, such a course necessarily indicates the principal artery of commerce, and for that reason is decisive of the *thalweg*.⁸

The Supreme Court of the United States, recognizing the doctrine of *thalweg*, has declared that in the case of navigable boundary rivers the line follows the "middle of the main channel of the stream."⁹

"following the deepest channel where it has more than one;" also down the "middle" of a specified branch of the river Gila. (*Id.*, I, 1109.) Article I of the Gadsden treaty with Mexico of December 30, 1853, referred to the "middle" of the Rio Grande, and likewise to that of the Colorado. (*Id.*, I, 1122.) In the preamble of the boundary convention with Mexico of November 12, 1884, it was declared that according to the provisions of the two last mentioned treaties the dividing line follows the "middle of the channel of the Rio Grande and Rio Colorado;" and it was therefore provided in Article I, that the dividing line should forever "follow the center of the normal channel of the rivers named, notwithstanding any alterations in the banks or in the course of those rivers, provided that such alterations be effected by natural causes through the slow and gradual erosion and deposit of alluvium and not by the abandonment of an existing river bed and the opening of a new one." (*Id.*, I, 1159-1160.)

⁷ Declares Westlake: "When a river forms the boundary between two states it is usual to say that the true line of demarcation is the *thalweg*, a German word meaning literally the 'downway,' that is the course taken by boats going down stream, which again is that of the strongest current. The slack current being left for the convenience of ascending boats. *Thal* in the sense of valley enters into *thalweg* only indirectly. The immediate origin of the word lies in the use of *berg* and *thal* to express the upward and downward directions on a stream, like *amont* and *aval* in French." (*Int. Law*, I, 141, and note 1.)

Declared the Supreme Court of the United States in the case of *Louisiana v. Mississippi*, 202 U. S. 1, 49: "The term 'thalweg' is commonly used by writers on international law in definition of water boundaries between States, meaning the middle or deepest or most navigable channel. And while often styled 'fairway' or 'midway' or 'main channel,' the word itself has been taken over into various languages. Thus in the treaty of Luneville, February 9, 1801, we find 'le Thalweg de l'Adige,' 'le Thalweg du Rhin,' and it is similarly used in English treaties and decisions, and the books of publicists in every tongue."

According to Article III of the "Plan respecting the International Regulation of Navigable Rivers," adopted by the Institute of International Law at Heidelberg, in 1887, "the frontier of the states separated by the rivers is marked by the *thalweg*, that is to say by the medial line of the channel." (*Annuaire*, IX, 182.)

⁸ See Sir G. S. Baker's 4th ed. of Halleck's *Int. Law*, 182, § 23.

⁹ See *Iowa v. Illinois*, 147 U. S. 1, 7-14; *Handly's Lessee v. Anthony*, 5 Wheat. 374;

The boundary line is subject to the gradual and imperceptible changes of the *thalweg* due to accretion or erosion, and produced by natural causes.¹⁰ If the change is perceptible and sudden, the boundary continues to follow the line indicated by the previous channel.¹¹ This is true whether the river leaving its former bed thereby makes for itself a *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535; *Keokuk & Hamilton Bridge Co. v. The People*, 145 Ill. 596; *Same v. Same*, 167 Ill. 15; *Keokuk & Hamilton Bridge Co. v. Illinois*, 175 U. S. 626; *Bellefontaine Improvement Co. v. Niedringhaus*, 181 Ill. 426; *Louisiana v. Mississippi*, 202 U. S. 1; *Iowa v. Illinois*, 202 U. S. 59. Compare, opinion of Mr. Crittenden, Attorney-General, 5 Op. Attys.-Gen., 412.

The Supreme Court of the United States, in the case of *Iowa v. Illinois* (147 U. S. 1, 7-14), has declared that, according to international law and the usage of European states, the terms "middle of the stream" and the "mid-channel" as applied to a navigable river, are synonymous and interchangeably used; and that the former was employed in the latter sense in the treaty of peace concluded by Great Britain, France and Spain at Paris in 1763. It may be doubted whether the quotations made from *Wheaton*, *Creasey*, *Twiss*, *Halleck*, *Woolsey* and *Phillimore*, sustain such a conclusion. It is believed that prior to the Treaty of Luneville of 1801, nations employed the term "middle of the stream" or "mid-stream" in boundary conventions for the reason that a line other than one drawn mid-way between the banks of a river was rarely contemplated. After that treaty, states having become familiar with the principle of *thalweg*, seem to have employed either that term or some other clearly synonymous with it whenever the new mode of demarcation was intended. The principal boundary treaties concluded since the beginning of the nineteenth century afford abundant evidence of the fact that states have generally taken great care to express their acceptance of the principle of *thalweg*, and have avoided the use of words the literal meaning of which might encourage the inference that the contracting parties sought to retain the old method of establishing a frontier.

¹⁰ See opinion of Mr. Cushing, Attorney-General, 8 Op. Attys.-Gen., 175; *Nebraska v. Iowa*, 143 U. S. 359; *McBaine v. Johnson*, 155 Missouri, 191; *Bellefontaine Improvement Co. v. Niedringhaus*, 181 Illinois, 426; Argument of the United States in the Chamizal Arbitration, p. 26.

See also Article I of the boundary convention between the United States and Mexico, of Nov. 12, 1884, which is believed to express with exactness the correct rule of law in the requirement, that in order to subject the boundary to variations of the *thalweg*, the changes in the latter must be "effected by natural causes." (Malloy's Treaties, I, 1159-1160.)

In the case of *Washington v. Oregon*, 211 U. S. 127, 136, the Supreme Court of the United States declares: "When, in a great river like the Columbia, there are two substantial channels, and the proper authorities have named the center of one channel as the boundary between the States bordering on that river, the boundary, as thus prescribed, remains the boundary, subject to the changes in it which come by accretion, and is not moved to the other channel, although the latter in the course of years becomes the most important and properly called the main channel of the river."

¹¹ See opinion of Mr. Cushing, Attorney-General, 8 Op. Attys.-Gen. 175; *Cooley v.*

new course, or simply alters by enlargement or otherwise the path of the principal channel.¹²

If a state which is the territorial sovereign over lands on both sides of a river makes a grant of territory on one side of the stream, "it retains the river within its own domain, and the newly erected state extends to the river only."¹³ Treaties have oftentimes recognized the fact that a river, instead of forming the boundary between two states, may be itself a part of the national domain of one riparian proprietor, the limit of whose territory is the further edge of the stream.¹⁴

Golden, 52 Mo. App. 229; *Nebraska v. Iowa*, 143 U. S. 359; *Missouri v. Nebraska*, 196 U. S. 23; *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535, 546.

¹² In the case of *Nebraska v. Iowa*, 143 U. S. 359, the Supreme Court of the United States held that while there might be an instantaneous and obvious erosion on one side of the Missouri River, if the accretion to the other side was gradual and imperceptible by alluvial deposits, the boundary would follow the changes in the channel thus effected, notwithstanding their rapidity.

In the case of the Chamizal Arbitration before the Special International Boundary Commission, under the convention between the United States and Mexico of June 24, 1910, a grave problem arose concerning the interpretation of the boundary convention between those countries of November 12, 1884, relating to the Rio Grande and Rio Colorado. Article I of that convention provided that the dividing line should follow the center of the normal channel of those rivers irrespective of any alterations in their banks or courses, provided that such alterations were "effected by natural causes through the slow and gradual erosion and deposit of alluvium and not by the abandonment of an existing river bed and the opening of a new one." The presiding commissioner, Professor La Fleur, and the Mexican commissioner, Mr. Puga, who constituted a majority of the tribunal, were of opinion that the language quoted signified that the boundary should not vary with alterations in the course of the Rio Grande in case of a rapid and obvious erosion even though there might be no abandonment of the river bed. The American commissioner, General Mills, was, however, of opinion that it was impossible to impute to the contracting parties an intention to prevent the boundary from following changes in the course of the river in the case of rapid and perceptible erosion unless there was also an abandonment of the existing river bed. For the text of the award of the court and the dissenting opinion of the American commissioner, see this JOURNAL, Vol. 5, p. 782.

¹³ *Handly's Lessee v. Anthony*, 5 Wheat. 374.

Writes Hall: "Upon whatever grounds property in the entirety of a stream or lake is established, it would seem in all cases to carry with it a right to the opposite bank as accessory to the use of the stream, and perhaps it even gives a right to a sufficient margin for defensive or revenue purposes, when the title is derived from occupation, or from a treaty of which the object is to mark out a political frontier" (5 ed., 123, quoted in Moore, Dig., I, 617, note.)

¹⁴ See, for example, Article III of the treaty between the United States and Spain

When a river forms the boundary between two states it is frequently agreed that neither shall, by artificial constructions, change the course of the *thalweg* and alter the navigability of the stream.¹⁵ Such agreements are declaratory of the equitable principle early enunciated by Vattel that it is wrongful for one state to promote its own advantage at its neighbor's expense.¹⁶ Lawful rectification of the boundary by artificial means requires the consent of the state whose frontier may be thereby affected. Gradual changes in the *thalweg* of the river forming the boundary between states of the United States is sometimes effected by artificial works, such as dams lawfully constructed by the Federal Government. Whether the boundary under such circumstances varies with the changes produced in the channel is dependent upon the domestic and constitutional law of the United States rather than upon principles of international law.¹⁷

If a non-navigable river forms the boundary between two states, it is generally believed that the dividing line follows the middle of the stream.¹⁸

3. ISLANDS

Islands existing or arising within a boundary river belong to the domain of the state on whose side of the *thalweg* or middle line (in case the of February 22, 1819, relative to the boundary along the river Sabine, Malloy's Treaties, II, 1652; also texts of boundary conventions in the Argument of the United States in the Chamizal Arbitration, 21-24.

In the Argument of the United States in the Chamizal Arbitration there is noted (p. 24) a small group of European boundary treaties, which provide that the *thalweg* shall be designated at fixed points, which shall thereafter be regarded as forming a fixed line of demarcation, notwithstanding subsequent changes of the channel. The text of the boundary convention between Russia and Westphalia of May 14, 1811 (*N. R. I.*, 382), is quoted.

¹⁵ See, for example, Articles II, III and IV of the treaty between the United States and Great Britain respecting the boundary waters between the United States and Canada of Jan. 11, 1909, Treaty Series, No. 548, SUPPLEMENT to this JOURNAL, IV, 239; also Article III of the boundary convention between the United States and Mexico of Nov. 12, 1884; Malloy's Treaties, I, 1159; Article III of convention of limits between France and Prussia of Oct. 23, 1829, Brit. & For. St. Pap., XVI, 907.

¹⁶ See Chitty's ed., § 271, p. 122. See also Bluntschli, *Das Moderne Völkerrecht der Civilisirten Staaten*, § 299; Calvo, 5 ed., I, § 342, p. 466.

¹⁷ See *Norton v. Whiteside*, 188 Fed. R. 356, 359.

¹⁸ See Hall, 6 ed., 123; Oppenheim, I, 254.

stream is not navigable) they may be located.¹⁹ If an island arises in the middle of a non-navigable stream, the frontier, in the absence of special agreement, doubtless follows an imaginary line drawn through the middle of the newly formed land. If, however, the river is navigable, as the boundary is indicated by the principal channel, the island necessarily comes into existence on one side or the other thereof, and hence should belong exclusively to one riparian proprietor.²⁰ Division of the island might, however, be fairly claimed if its formation was sudden and perceptible.

If by slow and imperceptible change of the *thalweg* the boundary is altered in such a way as to separate an island from the state to which it may have belonged, the right of ownership of the latter is not lost. This fact has been frequently recognized in European treaties.²¹ The right of sovereignty is, however, believed to change with the alterations of the *thalweg*. Thus the former sovereign, although retaining its title, loses its right of supreme control.²²

4. BRIDGES

According to European treaties of the nineteenth century, the frontier on a bridge crossing a river forming an international boundary was fixed at the middle point of the structure.²³ This may have been a

¹⁹ Such is the common provision of boundary conventions that refer to the matter. See, for example, Article IV of the convention between the Argentine Republic and Brazil of October 6, 1898, Brit. & For. St. P., XC, 85. See, also, Rivier I, 168.

²⁰ See Blatchford, J., in *St. Louis v. Rutz*, 138 U. S. 226, 249.

²¹ See, for example, definitive treaty of peace between the Allies and France of May 30, 1814, Brit. & For. St. Pap., I, pt. I, 156; also statement of E. Nys, concerning the treaties 1801-1840, affecting islands in the Rhine, in his *Droit International*, 2 ed., I, 430-435; also *St. Louis v. Rutz*, 138 U. S. 226, 250.

²² This principle is well expressed by Fiore (French translation by Antoine), II, § 781 and note. Compare, Rivier I, 168.

²³ See Treaty of Luneville of Feb. 9, 1801, between France and the Empire, De Clercq, *Traité*, I, 425; treaty between Baden and Argovie of Sept. 17, 1808, *N. R.*, I, 140; Article III of Treaty of Peace of Paris, Nov. 20, 1815, III, Brit. & For. St. P., 280, 285; decree promulgating treaty of limits between France and Spain of Dec. 2, 1856, Brit. & For. St. P., XLVII, 765; Final Act of delimitation of boundary respecting Sardinia, Austria and France, of Nov. 10, 1859, Brit. & For. St. P., LIII, 943; Declaration of Jan. 26, 1861, respecting the limit of sovereignty over bridges of the Rhine between France and Baden, De Clercq, *Traité*, VIII, 160; Final Act of delimitation of

natural consequence of the early doctrine that employed the middle rather than the principal channel of a navigable river to indicate the boundary. The requirements that led to the adoption of the *thalweg* as the mode of establishing a frontier bore no relation to bridges. The latter continued to be built and maintained at the equal expense of the riparian states whose territories were thus connected. The middle point of these structures continued to mark the true division of rights of sovereignty as well as ownership. As these related to what was in fact affected only to a slight degree by alterations of the courses of rivers that were spanned, riparian states were agreed that the frontier respecting bridges should not vary with changes of the *thalweg*. The boundary conventions that expressly or by implication referred to the matter seem to recognize this principle.²⁴

If the frontier with respect to a bridge over a boundary river is to be fixed from the time of construction, it would be most reasonable to make the division of rights of sovereignty coincide with the line of demarcation then recognized in the river itself. Thus, when the latter is the *thalweg*, it is believed that the point where the line of the principal channel intersects the bridge should designate the frontier, and the division thus indicated be given permanent recognition.²⁵

CHARLES CHENEY HYDE.

boundary between Austria and Italy of Dec. 22, 1867, Brit. & For. St. P., LXIII, 840; Final Act of the Powers fixing the Turko-Greek frontier, of Nov. 27, 1881, Brit. & For. St. P., LXXII, 738.

See, also, E. Nys, *Le Droit International*, 2 ed., I, 437; Rivier, I, 168; Oppenheim, I, § 199, note 4; G. Ullmann, *Völkerrecht*, 2 ed., § 80.

²⁴ Thus, in the Declaration of Jan. 21, 1861, respecting the limit of sovereignty over bridges of the Rhine between France and Baden, it is declared:

"1. The middle of the fixed bridge over the Rhine between Strasbourg and Kehl shall be regarded as the limit of sovereignty between France and the Grand Duchy of Baden.

"2. The same principle shall be adopted, hereafter, respecting the bridge of boats between Strasbourg and Kehl, as well as for all the bridges which shall be constructed in the future between France and the Grand Duchy of Baden.

"3. These provisions are independent of the limit of the waters, and shall be without prejudice as to that limit, such as is established annually, according to the *thalweg* of the Rhine." (De Clercq, *Traité*, VIII, 160.)

²⁵ Such was the policy of the United States and Mexico, expressed in the boundary convention of Nov. 12, 1884, respecting the Rio Grande and the Rio Colorado, according to Article IV of which it is provided that: "If any international bridge have

been or shall be built across either of the rivers named, the point on such bridge exactly over the middle of the main channel as herein determined shall be marked by a suitable monument, which shall denote the dividing line for all the purposes of such bridge, notwithstanding any change in the channel which may thereafter supervene. But any rights other than in the bridge itself and in the ground on which it is built shall in event of any such subsequent change be determined in accordance with the general provisions of this convention." (Malloy's Treaties, I, 1159, 1160.)

• THE HISTORY OF THE DEPARTMENT OF STATE

IX

DUTIES OF THE DEPARTMENT

V

The library of the Department was founded by Thomas Jefferson. In his estimates of expenses of June 17, 1790, he included subscriptions to fifteen American newspapers at an average of four dollars per year for each; \$200 to begin a collection of the laws of the States, and twenty-five dollars for the purchase of foreign gazettes, this amount including also payment for American papers to be sent to our agents abroad.¹ To this basis for a library should be added the laws and public documents deposited with the Department under various statutes, and books under the copyright law.

It was inevitable that some works on government and international law should find their way into an office occupied by such men of books as Jefferson and Madison. When the British invaded the city in 1814, no attempt was made to save the library and it was burned with the Department building.² The work of collecting was taken up again as soon as the office was reestablished. The Department was dependent upon its own library resources and did not have the privilege of drawing books from the Library of Congress, until it was granted by law January 30, 1830;³ but probably it had the larger collection of the two. By 1831 the documents and laws had become so numerous that Congress appropriated \$340 to pay for their storage.⁴

When Secretary McLane made his arrangement of the Department in

¹ AMERICAN JOURNAL OF INTERNATIONAL LAW, January, 1909, 148, 149.

² *Ibid.*, July, 1910, 605.

³ *History of the Library of Congress*, Johnston, I, 373.

⁴ 4 Stat., 452.

1833, the clerk who had charge of the Bureau of Pardons, Remissions and Copyrights was the librarian,⁵ this being the first record of a department librarian. The purchases for the library were from the general department fund, until the Act of August 17, 1882,⁶ made a specific appropriation of \$300 for the purpose. This amount was increased from time to time, and is now \$2,000 for books, maps and periodicals, domestic and foreign. The increasing expansion of the Library of Congress carried it into the same field in some respects as the library of the Department had occupied, and the latter has, in consequence, become a special library.

The fifteen newspapers of Jefferson's day increased until the Department had files of all the chief newspapers throughout the country. They were stored on the fourth floor of that wing of the building which the Department now occupies, and, the space being required by the War Department, on September 1, 1882, 3,508 volumes of newspapers were sent to the Library of Congress, more being added the following year. The laws of the States the Department was required to collect under its organic act, and it had what was probably the completest set of session laws in the country. The volumes were transferred to the Congressional Library in 1911, under authority of the Act of February 25, 1903, which will be quoted presently.

Historical manuscripts of great value were placed in the library under various purchases. The Act of June 30, 1834, authorized the purchase of the books and manuscripts of George Washington for \$25,000, and that of March 3, 1849, gave \$20,000 for a remaining lot. The Act of March 3, 1837, allowed \$30,000 for certain Madison papers and that of March 31, 1848, \$25,000 for the rest of the collection. The Act of August 12, 1848, gave \$20,000 for the Jefferson papers and the same amount for those of Alexander Hamilton, while this sum was allowed for James Monroe's papers also by the Act of March 3, 1849. The Act of August 7, 1882, appropriated \$35,000 for the papers of Benjamin Franklin. All of these collections, and the papers of the Continental Congress deposited with the Department when it was created, were sent to the Library of Congress in accordance with the following order:

⁵ *Ante*, July, 1910.

⁶ 22 Stat., 303.

The historical archives in the Department of State, known as the Revolutionary archives, and comprising (1) the records and papers of the Continental Congress; (2) the papers of George Washington; (3) the papers of James Madison; (4) the papers of Thomas Jefferson; (5) the papers of Alexander Hamilton; (6) the papers of James Monroe; (7) the papers of Benjamin Franklin; are by authority provided by the Act of Congress, entitled "An Act making appropriations for the legislative, executive, and judicial expenses of the government for the fiscal year ending June 30, 1904, and for other purposes," approved February 25, 1903, hereby ordered to be transferred from the Department of State with such exceptions and reservations in each collection herein enumerated as in the discretion of the Secretary of State may be required for the continuity and completeness of the records and archives of the Department of State—to the possession and custody of the Library of Congress, to be there preserved and rendered accessible for historical and other legitimate uses under such rules and regulations as may from time to time be prescribed by the Librarian of Congress.

The transfer here directed shall be made on the 1st day of July, 1903, or as promptly thereafter as shall be found conveniently practicable to the Department of State and the Library of Congress.

THEODORE ROOSEVELT.

WHITE HOUSE, *March 9, 1903.*⁷

The Act approved February 25, 1903, was:

The head of any Executive Department or bureau or any commission of the Government is hereby authorized from time to time to turn over to the Librarian of Congress, for the use of the Library of Congress, any books, maps, or other material in the Library of the Department, bureau, or commission no longer needed for its use, and in the judgment of the Librarian of Congress appropriate to the uses of the Library of Congress.⁸

The Department retained certain papers of the Continental Congress pertaining to foreign affairs and the committee and Department of Foreign Affairs; Madison's journal of the debates in the Constitutional Convention and some of Madison's letters on the subject of the formation of the Constitution.

Previous to this important transfer, the Department turned over to the War Department all muster rolls and purely military papers pertaining to the Revolution under the authority of the Act of August 18, 1894.⁹

⁷ Annual Report, Librarian of Congress, 1903, 24, 25.

⁸ Quoted in Annual Report, Librarian of Congress, 1903, 23.

⁹ 28 Stat., 403, 404.

The collecting of books has been in the direction of international law, American history and foreign countries, the result being a select special library of approximately 50,000 volumes. No catalogue of the library has ever been printed; but from time to time special lists have been published, the most important of which are: in 1887 *Catalogue of the Works Relative to the Law of Nations and Diplomacy in the Library of the Department of State*, prepared under the direction of Theodore F. Dwight; under the same direction, *A List of Books Received at the Library of the Department of State, July 1-October 30, 1886, with References to International Treaties and Articles on Subjects Relative to the Law of Nations and Diplomacy in Magazines Received During the Same Period*. The third, fourth, and fifth issues of these lists included indexes of the publications of the second session of the forty-ninth Congress which concerned the Department of State. These publications were discontinued, owing to the insufficient clerical force at the library's disposal. A new series was started by the Librarian, Andrew H. Allen, *A List of Books and Pamphlets Received at the Library of the Department of State, by Purchase, Exchange, and Gift, during the Period from May 27, 1892, to October 1, 1892, Supplemented by a List of Periodicals and Newspapers Now Currently Received*. The first issue appeared in October, 1892, and subsequent issues were made at irregular intervals up to 1905, when it was abandoned.

The library has never been a public one, although it has always been open to any responsible person for reference or research work; but books may be taken out from it only by the members of the Department staff and the diplomatic corps.

Supervision of the diplomatic and consular service is one of the principal duties of the Department of State, and since President Roosevelt's order of June 27, 1906, with respect to consuls, and President Taft's order of November 26, 1909, with respect to secretaries of embassy and legation, the selection of those who are to enter the service has proceeded according to a system which the Department executes.

The first consul of the United States was William Palfrey, appointed by the Continental Congress November 4, 1780, at an annual salary of \$1,500, to reside in France. No consular system was then adopted, however, nor was one prescribed by Congressional authority until some

years after the Department of State was organized.¹⁰ In 1790 Washington appointed six consuls and ten vice-consuls under his general constitutional authority, and on August 29, 1790, Secretary Jefferson issued a circular prescribing their duties. They served, however, without compensation, except as they derived it from fees charged the individuals for whom they did services. Americans engaged in trade in foreign ports were selected as consuls, but in some places where there were no Americans, foreigners were appointed. The Acts of April 14, 1792, February 28, 1803, and March 1, 1823, defined a consul's duties. Martin Van Buren, as Secretary of State, in a report dated February 10, 1830,¹¹ made important recommendations on the subject of a consular system. His report was followed by one of equal consequence by Secretary Edward Livingston which President Jackson sent to Congress March 2, 1833.¹² Other reports were made, but it was not until March 1, 1855, that a bill was passed remodelling the service. In an amended form it was passed August 18, 1856,¹³ and was the Act under which the service was conducted for fifty years, until June 30, 1906, when the Act of April 5 of that year went into effect.

The Act of 1856 was intended to create a corps of consuls having permanent tenure of their offices, but the "spoils system" defeated this purpose and the consuls were appointed and removed for political or personal reasons. The tenure of office was short and uncertain and the service as a whole was inefficient. The Department had the training of the consuls, but most of them were put out of office before they were trained. Many efforts were made to remedy the evil. In 1866 an order required the examination of applicants for consulates, but only one examination was held. Executive orders of April 16, 1872, and March 14, 1873, issued under the Civil Service Act of March 3, 1871, outlined a plan of appointment not unlike that now followed, but the civil service law was effectually repealed by the failure of Congress to appropriate for the pay of the Civil Service Commission.

¹⁰ See Wilbur J. Carr's comprehensive paper *The American Consular Service*, in this JOURNAL for October, 1907, for a fuller account of the service and its reorganization.

¹¹ Senate Report No. 57, 21st Congress, 2d sess.

¹² Senate Doc. No. 83, 22d Cong., 2d sess.

¹³ 11 Stat., 64.

Successive attempts to secure legislation failed, but by an order of June 20, 1895, President Cleveland provided for a merit system of appointment for consulates having salaries of more than \$1,000 and not more than \$2,500 per annum. This order was effective during the remaining year of Mr. Cleveland's term, but his successor reverted to the old system, which continued to flourish until the executive order of 1906 went into effect.

The order is as follows:

Whereas, the Congress, by § 1753 of the Revised Statutes of the United States, has provided as follows:

"The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service."

And, whereas, the Congress has classified and graded the consuls-general and consuls of the United States by the act entitled "An Act to provide for the reorganization of the consular service of the United States," approved April 5, 1906, and has thereby made it practicable to extend to that branch of the civil service the aforesaid provisions of the Revised Statutes and the principles embodied in the Civil Service Act of January 16, 1883.

Now, therefore, in the exercise of the powers conferred upon him by the Constitution and laws of the United States, the President makes the following regulations to govern the selection of consuls-general and consuls in the civil service of the United States, subject always to the advice and consent of the Senate:

1. Vacancies in the office of consul-general and in the office of consul above class 8 shall be filled by promotion from the lower grades of the consular service, based upon ability and efficiency as shown in the service.

2. Vacancies in the office of consul of class 8 and of consul of class 9 shall be filled:

- (a) * By promotion on the basis of ability and efficiency as shown in the service, of consular assistants † and of vice consuls, deputy consuls, consular agents, student interpreters and interpreters in the consular or diplomatic service, who shall have been appointed to such offices upon examination.

- (b) By new appointments of candidates who have passed a satisfactory examination for appointment as consul as hereafter provided.

3. Persons in the service of the Department of State with salaries of two thousand dollars or upwards shall be eligible for promotion, on the basis of ability and efficiency as shown in the service, to any grade of the consular service above class 8 of consuls.

* As amended by Executive orders of December 12, 1906, and April 20, 1907.

† As amended by the Act approved May 21, 1908.

4. The Secretary of State, or such officer of the Department of State as the President shall designate, the Director of the Consular Service,* the Chief of the Consular Bureau,* and the Chief Examiner of the Civil Service Commission, or some person whom said Commission shall designate, shall constitute a Board of Examiners for admission to the consular service.

5. It shall be the duty of the Board of Examiners to formulate rules for and hold examinations of applicants for admission to the consular service.

6. The scope and method of the examinations shall be determined by the Board of Examiners, but among the subjects shall be included at least one modern language other than English; the natural, industrial and commercial resources and the commerce of the United States, especially with reference to the possibilities of increasing and extending the trade of the United States with foreign countries; political economy; elements of international, commercial and maritime law.

7. Examination papers shall be rated on a scale of 100, and no person rated at less than 80 shall be eligible for certification.

8. No one shall be examined who is under twenty-one or over fifty years of age, or who is not a citizen of the United States, or who is not of good character and habits and physically and mentally qualified for the proper performance of consular work, or who has not been specially designated by the President for appointment to the consular service subject to examination.

9. Whenever a vacancy shall occur in the eighth or ninth class of consuls which the President may deem it expedient to fill, the Secretary of State shall inform the Board of Examiners, who shall certify to him the list of those persons eligible for appointment, accompanying the certificate with a detailed report showing the qualifications, as revealed by examination, of the persons so certified. If it be desired to fill a vacancy in a consulate in a country in which the United States exercises extra-territorial jurisdiction, the Secretary of State shall so inform the Board of Examiners, who shall include in the list of names certified by it only such persons as have passed the examination provided for in this order, and who also have passed an examination in the fundamental principles of the common law, the rules of evidence and the trial of civil and criminal cases. The list of names which the Board of Examiners shall certify shall be sent to the President for his information.

10. No promotion shall be made except for efficiency, as shown by the work that the officer has accomplished, the ability, promptness and diligence displayed by him in the performance of all his official duties, his conduct and his fitness for the consular service.

11.† It shall be the duty of the Board of Examiners to formulate rules for and hold examinations of persons designated for appointment as consular assistant ‡ or as student interpreter, and of such persons designated for appointment as vice consul, deputy consul and consular agent, as shall desire to become eligible for promotion. The scope and method of such examination shall be determined by the Board of Examiners, but it shall include the same subjects hereinbefore prescribed for the examination of consuls. Any vice consul, deputy consul or consular agent now in the

* As amended by Executive order of December 8, 1909.

† As amended by Executive order of December 12, 1906.

‡ As amended by the Act approved May 21, 1908.

service, upon passing such an examination shall become eligible for promotion, as if appointed upon such examination.

12. In designations for appointment subject to examination and in appointments after examination, due regard will be had to the rule, that as between candidates of equal merit, appointments should be so made as to secure proportional representation of all the States and Territories in the consular service; and neither in the designation for examination or certification or appointment will the political affiliations of the candidate be considered.

THEODORE ROOSEVELT.

THE WHITE HOUSE, *June 27th, 1906.*

President Taft issued the following with respect to examinations:

No officer or employee of the Government shall, directly or indirectly, instruct or be concerned in any manner in the instruction of any person or classes of persons, with a view to their special preparation for the examinations of the Boards of Examiners for the diplomatic and consular services.

The fact that any officer or employee is found so engaged shall be considered sufficient cause for his removal from the service.

WM. H. TAFT.

THE WHITE HOUSE, *December 23, 1910.*

This order has been held not to apply to professional instruction in a university where some of the class may contemplate taking the consular examination.

Following the order, the Department prescribed the following:

REGULATIONS GOVERNING EXAMINATIONS PROMULGATED BY THE BOARD OF
EXAMINERS DECEMBER 13, 1906

1. The examinations will be the same for all grades and will be to determine a candidate's eligibility for appointment in the consular service, irrespective of the grade for which he may have been designated for examination and without regard to any particular office for which he may be selected.

2. The examinations will consist of an oral and a written one, the two counting equally. The object of the oral examination will be to determine the candidate's business ability, alertness, general contemporary information, and natural fitness for the service, including moral, mental, and physical qualifications, character, address, and general education and good command of English. In this part of the examination the applications previously filed will be given due weight by the Board of Examiners, especially as evidence of the applicant's business experience and ability. The written examination will include those subjects mentioned in the Executive order, to wit, at least one modern language other than English — French, German, or Spanish; * the natural, industrial, and commercial resources and the commerce of the United States, especially with reference to possibilities of increasing and extending the foreign

* As amended by the Board of Examiners February 18, 1911.

trade of the United States; political economy, and the elements of international, commercial, and maritime law. It will likewise include American history, government, and institutions; political and commercial geography; arithmetic (as used in commercial statistics, tariff calculations, exchange, accounts, etc.); the modern history, since 1850, of Europe, Latin America, and the Far East, with particular attention to political, commercial, and economic tendencies. In the written examination, composition, grammar, punctuation, spelling, and writing will be given attention.

3. To become eligible for appointment, except as student interpreter, in a country where the United States exercises extraterritorial jurisdiction, the applicant must pass the examination outlined above, but supplemented by questions to determine his knowledge of the fundamental principles of common law, the rules of evidence, and the trial of civil and criminal cases.

4. The examinations to be given candidates for appointment as student interpreters will follow the same course as in the case of other consular officers, provided, however, that no one will be examined for admission to the consular service as a student interpreter who is not between the ages of nineteen and twenty-six, inclusive, and unmarried; and, provided further, that upon appointment each student interpreter shall sign an agreement to continue in the service so long as his services may be required, within a period of five * years.

5. Upon the conclusion of the examinations the names of the candidates who shall have attained upon the whole examination an average mark of at least eighty, as required by the Executive order, will be certified by the Board to the Secretary of State as eligible for appointment in the consular service, and the successful candidates will be informed that this has been done.

6. The names of candidates will remain on the eligible list for two years, except in the case of such candidates as shall within that period be appointed, or as shall withdraw their names, and of candidates holding subordinate positions in the consular service, when eligibility shall not expire until appointment to consular rank or until separation from the service. Candidates whose names have thus been dropped from the eligible list will not again be eligible for appointment unless upon fresh application, designation anew for examination, and the successful passing of such second examination. †

Along with the efforts for reform of the consular service, but less vigorously, has grown a demand for a merit system of appointment in the diplomatic service. The bill with which the successful agitation for the reform began was introduced in the Senate by Senator Morgan of Alabama in 1895 and included the diplomatic service in its scope, but this feature was dropped out of the subsequent bills. So far as the subordinate diplomatic offices are concerned, the improvement desired has been effected by the following order of President Taft:

* As amended by the Act approved May 21, 1908.

† As amended by the Board of Examiners October 25, 1911.

Whereas, the Congress, by § 1753 of the Revised Statutes of the United States has provided as follows:

"The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service."

And, Whereas, it is deemed best for the public interest to extend to the diplomatic service the aforesaid provision of the Revised Statutes and the general principles embodied in the Civil Service Act of January 16th, 1883:

(1) The Secretary of State is hereby directed to report from time to time to the President, along with his recommendations, the names of those secretaries of the higher grades in the diplomatic service who by reason of efficient service have demonstrated special capacity for promotion to be chiefs of mission.

(2) There shall be kept careful efficiency records of every officer of the diplomatic service, in order that there may be no promotion except upon well established efficiency as shown in the service, and that retention in the service may be conditioned upon the officers' maintaining a degree of efficiency well up to the average high standard which the interests of the service demand.

(3) Initial appointments from outside the service to secretaryships in the diplomatic service shall be only to the classes of Third Secretary of Embassy, or, in case of higher existent vacancies, of Second Secretary of Legation, or of Secretary of Legation at such post as has assigned to it but one secretary. Vacancies in secretaryships of higher classes shall be filled by promotion from the lower grades of the service, based upon efficiency and ability as shown in the service.

(4) To make it more practicable to extend to the appointment, promotion, transfer, or retention of secretaries in the diplomatic service the civil service principle of promotion on the basis of efficiency as shown in the service, and in order that the action of the Department may be understood by the officers concerned, all secretaryships in the diplomatic service shall be graded according to the importance, volume, difficulty, or other aspects of the work done by each mission in proportion to the number of men allotted to it, and this classification shall be made known to the members of the service.

(5) A person separated from a secretaryship in the diplomatic service without delinquency or misconduct at his own request in writing may, within a period of one year from the date of such separation, be reinstated in the grade from which he was separated, provided he shall have been originally appointed after the prescribed examination for that grade. In the event, however, that such separation shall be for the purpose of undertaking other work under the Department of State, the limitation of one year for eligibility for reinstatement shall not hold. This rule shall be applicable as regards reinstatements to the consular service and also to the Department of State when transfers shall have been to another branch of the foreign service.

(6) The Assistant Secretary of State, the Solicitor for the Department of State, the Chief of the Diplomatic Bureau, and the Chief of the Bureau of Appointments,

and the Chief Examiner of the Civil Service Commission or some person whom the Commission shall designate, or such persons as may be designated to serve in their stead, are hereby constituted a Board whose duty it shall be to determine the qualifications of persons designated by the President for examination to determine their fitness for possible appointment as secretaries of embassy or legation.

(7) The examination herein provided for shall be held in Washington at such times as the needs of the service require. Candidates will be given reasonable notice to attend, and no person shall be designated to take the examination within thirty days of the time set therefor.

(8) The examinations shall be both oral and in writing and shall include the following subjects: — international law, diplomatic usage, and a knowledge of at least one modern language other than English, to wit, French, Spanish, or German; also the natural, industrial and commercial resources and the commerce of the United States, especially with reference to the possibilities of increasing and extending the trade of the United States with foreign countries; American history, government and institutions; and the modern history since 1850 of Europe, Latin America and the Far East. The object of the oral examination shall also be to determine the candidate's alertness, general contemporary information, and natural fitness for the service, including mental, moral, and physical qualifications, character, address, and general education and good command of English. In this part of the examination the applications previously filed will be given due weight by the Board of Examiners. In the determination of the final rating, the written and oral ratings shall be of equal weight. A physical examination shall also be included as supplemental.

(9) Examination papers shall be rated on a scale of 100, and no person with a general rating of less than 80 shall be certified as eligible.

No person shall be certified as eligible who is under twenty-one or over fifty years of age, or who is not a citizen of the United States, or who is not of good character and habits and physically, mentally, and temperamentally qualified for the proper performance of diplomatic work, or who has not been specially designated by the President for appointment to the diplomatic service subject to examination and subject to the occurrence of an appropriate vacancy.

(10) Upon the conclusion of the examinations, the names of the candidates who shall have attained upon the whole examination the required mark will be certified by the Board to the Secretary of State as eligible for appointment.

(11) The names of candidates will remain on the eligible list for two years, except in the case of such candidates as shall within that period be appointed or shall withdraw their names. Names which have been on the eligible list for two years will be dropped therefrom and the candidates concerned will not again be eligible for appointment unless upon fresh application, designation anew for examination, and the successful passing of such second examination.

(12) Applicants for appointment who are designated to take an examination and who fail to report therefor, shall not be entitled to take a subsequent examination unless they shall have been specifically designated to take such subsequent examination.

In designations for appointment subject to examination and in appointments after examination, due regard will be had to the rule, that as between candidates of equal

merit, appointments should be made so as to tend to secure proportional representation of all the States and Territories in the diplomatic service; and neither in the designation for examination or certification or appointment after examination will the political affiliations of the candidates be considered.

(13) The Board of Examiners is authorized to issue such notices and to make all such rules as it may deem necessary to accomplish the object of this regulation.

(14) Transfers from one branch of the foreign service to another shall not occur except upon designation by the President for examination and the successful passing of the examination prescribed for the service to which such transfer is made. Unless the exigencies of the service imperatively demand it, such person to be transferred shall not have preference in designation for the taking of the examination or in appointment from the eligible list, but shall follow the course of procedure prescribed for all applicants for appointment to the service which he desires to enter. To persons employed in the Department of State at salaries of eighteen hundred dollars or more, the preceding rule shall not apply and they may be appointed, on the basis of ability and efficiency, to any grade of the diplomatic service.

(15) The Secretary of State may, as provided by Rule III of the present Civil Service Rules, request the Civil Service Commission to hold special examinations for the position of clerk of class two or above in the Department of State, such examination to follow generally and so far as the Secretary of State shall deem practicable, the lines of the present foreign service examinations.

(16) In the case of promotions in the Department of State to the grades of clerk of class two or above, the Secretary of State may require the passing of an examination in the general nature of the present diplomatic or consular service examinations.

(17) With further reference to the matter of promotions in the Department of State, the Secretary of State is directed to cause to be kept, as a guide in determining the promotion or retention of the personnel, a careful record of the efficiency of each clerk in the Department.

WM. H. TAFT.

THE WHITE HOUSE, November 26, 1909.

This was supplemented by:

INFORMATION FOR APPLICANTS

Diplomatic service examinations are not held at regularly stated periods, but only at such times as it is deemed expedient to replenish the list of those eligible for such appointment. The dates of the holding of examinations are publicly announced through the press.

Although designations for examination are made by the President, applications for appointment should be addressed to the Secretary of State.

An application is considered as pending for a period of two years. After such period has elapsed without its being acted upon, another application with endorsements will be necessary to obtain for it further consideration.

Applicants for appointment, in their correspondence with the Department, should always sign their names as given in their applications, without enlargement or contraction.

A candidate is not designated for examination with a view to his appointment to a particular post, but in order to determine his eligibility for appointment to such a post as in the judgment of the Department his services would best serve the public interest.

No special training is accepted in lieu of the prescribed examination.

The Department is not able definitely to forecast when vacancies in the service may occur.

Blank forms of application for appointment may be had upon application to the Department of State.

For information concerning the appointment of clerks in diplomatic missions, see page 8.

We have now considered the main functions of the Department and it remains only to show how the duties are distributed at the present day.¹⁴

The Secretary, Assistant Secretaries, Solicitor and Counsellor have general authority over the whole Department. Specifically, the Secretary and Assistant Secretary supervise all the other officers, divisions and bureaus. Under the Second Assistant Secretary is the diplomatic branch of the Department's affairs; under the Solicitor the Bureau of Citizenship; under the Third Assistant Secretary the Bureau of Rolls and Library, Bureau of Accounts and Diplomatic Bureau in part; under the Director of the Consular Service the Consular Bureau and Bureau of Trade Relations; under the Chief Clerk the translators, printing office, stationery room, telephone room, carpenter, lithographer, mail room, despatch agents and stables. The Division of Far Eastern Affairs has charge of interests other than of an administrative nature in Japan, China, Siberia, Hong Kong, French Indo-China, Siam, the Straits Settlements, Borneo, East Indies and India. The Division of Near Eastern Affairs has similar jurisdiction in Germany, Austria-Hungary, Russia, Roumania, Servia, Bulgaria, Montenegro, Turkey, Greece, Italy, Abyssinia, Persia, Egypt, and colonies of those countries. The Western European Division has Great Britain and colonies, Portugal, Spain, France, Morocco, Belgium, the Congo, Switzerland, Norway, Sweden, the Netherlands, Luxemburg, Denmark, and Liberia. The Diplomatic Bureau has the administration of the diplomatic service at large, its personnel, ceremonial matters, the formalities of treaty-making, and miscellaneous correspondence relating to diplomatic affairs. The Con-

¹⁴ *Outline of the Organization and Work of the Department of State*, 1911.

sular Bureau has similar jurisdiction over the consular corps. The Bureau of Trade Relations has supervision of trade reports and trade correspondence of American consular and diplomatic affairs and the compilation of commercial information and drafting of official correspondence on commercial questions. The Bureau of Appointments has charge of all applications, examinations and appointments to office, makes out commissions and nominations, makes out and records extradition warrants, prepares the Department registers and has the custody of the Great Seal. The Bureau of Citizenship has the issuance of passports at home and abroad under its supervision, and consideration of questions of citizenship and protection of Americans abroad, and authentications, and has custody of the Department seal. The Division of Information collects and prepares information concerning our foreign affairs, which is sent to diplomatic and consular officers. The Bureau of Accounts manages the Department finances, receiving and disbursing its funds, managing the accounts of all kinds, diplomatic, consular, Departmental and international indemnity trust funds. The Bureau of Rolls and Library manages the library, books, documents, orders, laws and certain miscellaneous archives which have already been described. The Law Clerk prepares the laws for publication. The Bureau of Indexes and Archives records, distributes, files and indexes the Department correspondence. The mailing section of the Department forwards and receives all mail, domestic and foreign, the latter including the official mail which goes in sealed pouches to American diplomatic officers. The translators translate all official correspondence that may be sent to them. The foreign languages employed by diplomatic officers in Washington are French, German, Italian, Spanish and Portuguese. The Russian representative uses French or English, the Turkish, Japanese and Chinese use English. Letters come to the Department in many languages however, — Swedish, Norwegian, Polish, Russian, Magyar, Greek, Hungarian, Chinese, Japanese and Hebrew being among them.

X

DEPARTMENT BUILDINGS

The first meeting place of the Congress, where the plan for the conduct of our foreign affairs was first taken into consideration, was Carpenters' Hall, a building which had been constructed for the Society of House Carpenters, of Philadelphia. It stands at the end of an alley, south from Chestnut street, between Third and Fourth streets. The lower floor, consisting of one large room, was occupied by the Congress, and the rooms in the second story by committees. From Carpenters' Hall the government went to what has ever since been known as Independence Hall.

As soon as the Department of Foreign Affairs was organized under Livingston, it took possession of a small house in Philadelphia, owned by Peter L. Du Ponceau, No. 13 South Sixth street, on the eastern side. Livingston's office was in the front room of the second floor, and in the back room were the under secretaries, while the clerks and interpreters occupied the room on the ground floor. This building was demolished in 1846. It was occupied as the Office of Foreign Affairs from the latter part of 1781 up to June, 1783, when the Department was practically suspended until Jay took control of it in 1785.

In January, 1785, the seat of government being moved to New York, the Department of Foreign Affairs found quarters in the famous Fraunce's Tavern, in the long room of which Washington had taken farewell of the generals of the Revolution at the close of the war. Here it remained till 1788, when it moved to the west side of Broadway, in a house owned by Philip Livingston, near the Battery. Later it was moved to another house on the same street on the opposite side.

The capital having been again located at Philadelphia, the Department took up its abode first on Market street, then on the southeast corner of Arch and Sixth streets, then in North Alley, and finally at the northeast corner of Fifth and Chestnut streets, where it remained until it was moved to Washington, except for an interval of three months from August to November, 1798, when it occupied the State House at Trenton,

N. J., the office being moved from Philadelphia on account of an epidemic of yellow fever.

On June 1, 1800, the archives were lodged in the Treasury, the only building sufficiently completed to receive them, and August 27 were placed in one of the "six buildings" on Pennsylvania avenue and Twentieth street. In May, 1801, the offices were placed in the large brick building on Seventeenth street, opposite G street, known as the War Office, and here they remained up to December, 1819, with an interval from September, 1814, to April, 1816, when it occupied a building on the south side of G street, near Eighteenth, pending the repair of its former building, which had been demolished in the invasion of the city by the British troops.

In January, 1820, the offices were moved to the corner of Fifteenth street and Pennsylvania avenue, the site now covered by the north wing of the United States Treasury, and there it remained up to October, 1866, when it leased the premises then belonging, as now, to the Washington Orphan Asylum, on Fourteenth street, near S street. It remained there until July, 1875, when it was removed to its present quarters which constitute the south wing of the State, War, and Navy Building.

When it first moved to its present home it did not fill the whole building and all the space above the third floor was given over to the storage of newspapers and books, while about a fourth part of the basement and first floor were not used. The latter space was given to the Navy Department, and when the newspapers were moved to the Library of Congress the fourth floor and attic of the Department's wing were occupied by the War Department. This arrangement proved in the end most unfortunate. Had the Department retained the whole wing originally allotted to it, all of its offices might even now be under the same roof and the increasing embarrassment to its business by overcrowding and separation might have been avoided. The quarters which it occupied were reasonably sufficient until about 1895; after that time they became more and more crowded, until separation from the main building of some of the offices became imperative. The first bureau to go was the Bureau of Trade Relations, which was given quarters in the Rochambeau Apartment House, on Connecticut avenue near H street. A house on Seventeenth street opposite the Department, at the corner of New York avenue,

was next rented by the Department in 1908 and occupied by the Bureau of Citizenship, the Bureau of Trade Relations and the translator. More crowding in the main building sent the Solicitor's office to take the place of the Bureau of Trade Relations, which moved in 1909 to the Union Trust Company's building, at the corner of Fifteenth and H streets. To this building came also the Bureau of Accounts in 1910. In 1911 the building on Seventeenth street was abandoned and the house of Blair Lee, Esq., on Pennsylvania avenue, opposite the War Department, was rented.

In his report of 1896 Secretary Olney said that a new building for the Department would soon be imperative, and since then the necessity has been urged repeatedly by Secretaries of State. The act of July 25, 1910, provided for the purchase of the land bounded by Pennsylvania avenue, Fifteenth street, the Mall and Fourteenth street, on which to erect buildings for the State Department and the Departments of Commerce and Labor and Justice.

A competition for designs for the new building was held, twenty firms of architects being invited to compete, and on January 6, 1911, the award for the best design was made to Mr. Arnold W. Brunner of New York. From Mr. Brunner the following notes of the design have been obtained.

The Department of State is intended to form one of the group of three buildings facing Fifteenth street. The new building for the Department of Commerce and Labor is to be located to the north of it, and the building for the Department of Justice is to be placed between that and Pennsylvania avenue.

The new building for the Department of State, which is approximately 325 feet square, has its principal façade on the Mall. This façade is broken in the centre by a great portico consisting of a double row of ten Corinthian columns 53 feet high supporting a pediment, the apex of which is 87 feet above the first floor. These columns rest upon a platform approached by a flight of steps 110 feet in width.

The remainder of the building is treated simply with a Doric cornice. There are two projecting pavilions with columns on the Fourteenth and on the Fifteenth street fronts. The B street elevation has a series of columns indicating the library.

The building is placed on a terrace, which completely frames it and which is extended on the B street elevation to provide proper approaches. There is one large interior court.

The great portico of the south front marks the monumental portion of the building, while the suites of offices are clearly indicated by the treatment of the windows of the other portion of the exterior.

On the main floor there is the great entrance hall 31 feet wide and 122 feet long. A monumental staircase, 24 feet wide, leads from this to a rotunda surrounded by a gallery, which gives access to the hall for international conferences, reception rooms and state dining room.

The hall for international conferences is 40 feet wide and 122 feet long and is sub-divided into three bays. It is ornamented with columns and pilasters and has an elaborate ceiling. There are committee rooms in connection with it conveniently located.

The banqueting hall is 35 feet x 67 feet and can be approached either from the galleries surrounding the rotunda, or through the reception rooms. In connection with the dining room there are kitchens, service pantries, etc.

Provision for an entrance for carriages and automobiles is provided for this portion of the building, with ample coat rooms, etc.

The central portion of the building is specially designed for important state functions and planned to secure good circulation for large crowds of people. It can be separated from the rest of the building if desired, but it is connected with the principal offices of the Secretary of State.

The library of the Department is placed in the centre of the north front and contains a large entrance hall with steel vault for the most important documents, reading rooms for special study, stack room, and the usual library equipment, all of which is to be of fireproof construction.

The rest of the building is divided into offices for the various subdivisions of the Department.

Besides the entrances on the Mall and on B street, there are two on Fifteenth street and two on Fourteenth street. Carriage entrances to the court are also provided on B street.

The offices for the Secretary of State and his assistants are located on the first floor, in the southwest corner of the building, in close connection

with the rooms for state functions and with the diplomatic reception rooms.

The rooms used for diplomatic conferences and receptions are large and dignified and are connected by a vaulted anteroom which opens on a terrace that overlooks the court.

Besides the main staircase there are four staircases in the building with ample elevator service, and a private staircase and elevator in connection with the Secretary's office.

Special provision has been made for space for filing documents and 30,000 square feet of space is allotted for filing space for the future.

The following is a list of offices used for the various subdivisions of the State Department:

SECRETARY'S GROUP.

Office of the Secretary of State.

Private office, public office, ante-room, 2 rooms for private secretaries, 1 for clerks, private toilet rooms, etc.

Office of the Assistant Secretary of State.

Private office, general office, ante-room, 2 rooms for private secretaries.

ASSISTANT SECRETARIES AND CHIEF CLERK.

Office of the Second Assistant Secretary.

Office, ante-room, private secretary, vault and toilet.

Office of the Third Assistant Secretary.

Office, ante-room, private secretary, vault and toilet.

Director of Consular Service.

Office, ante-room, private secretary, vault and toilet.

Chief Clerk.

Office, ante-room, private secretary, vault and toilet.

LAW DIVISION.

The Counsellor.

Office, ante-room, private secretary, vault and toilet.

The Solicitor.

Private office, offices for assistant solicitors and law clerks, ante-room, chief clerk, offices for stenographers and two rooms for arbitration work.

BUREAU OF ROLLS AND LIBRARY.

Office of Chief of Bureau.

Vault, toilet, large fireproof steel vault, library large enough to take care of 100,000 volumes, reading room, document clerk, map room, room for files, catalogue room, 9 study and typewriter rooms, packing rooms, newspaper room for 2,500 bound volumes.

BUREAU OF TRADE RELATIONS.

Office of Chief of Bureau.

Ante-room, rooms for two commercial advisers, reference library, 2 typewriter rooms, editorial office, statistical office and files room.

GEOGRAPHICAL DIVISIONS.

Division of Western European Affairs.

Rooms for Chief of Division, ante-room, clerical force, typewriters, 4 rooms for officers on detail, vault and toilet.

Division of Latin American Affairs.

Rooms for Chief of Division, vault and toilet and ante-room, two assistant chiefs, conference room, files room, drafting room, typewriter room, 6 rooms for officers on detail and two additional offices.

Division of Far Eastern Affairs.

Rooms for Chief of Division, ante-room, clerical force, typewriters, 4 rooms for officers on detail, vault and toilet.

Division of Near Eastern Affairs.

Rooms for Chief of Division, ante-room, clerical force, typewriters, 4 rooms for officers on detail, vault and toilet.

BUREAUS.

Diplomatic Bureau.

Offices for Chief of Bureau, assistant chief, ante-room, rooms for clerks, mailing room, diplomatic school, vault and toilets.

Consular Bureau.

Offices for Chief of Bureau, assistant chief, ante-room, typewriters, four rooms for drafting clerks, reference library,

map and file room, mailing room, packing room and consular school.

Bureau of Citizenship.

Offices for Chief of Bureau, assistant chief, ante-room, clerical force, passport room, two file rooms, seal and stationery.

Bureau of Information.

Office for Chief of Division, assistant chief, ante-room, newspaper clipping room, 2 file rooms, editorial room, vaults and toilet.

Bureau of Accounts.

Offices for Chief of Bureau, burglar and fireproof vault, ante-room, private office, 3 additional offices, file room (fireproof), vault and toilets.

Bureau of Appointments.

Office for Chief of Bureau, assistant chief, ante-room, two rooms for clerks, file room, vault and toilet.

Index Bureau.

Offices for Chief of Bureau, vault and toilet, cipher room for vault, telegraph room, large room for the clerical force, room for the indexes of old records, 3 rooms for research work, with its office, 2 rooms for ministers, room for unbound files, room for bound files, filing space for future years, telephone and telegraph room, with living rooms, bedrooms, toilets and baths.

Translators.

Main office and two general offices, 2 stenographers rooms and file room.

GAILLARD HUNT.

BOARD OF EDITORS OF THE AMERICAN JOURNAL
OF INTERNATIONAL LAW

CHANDLER P. ANDERSON, Washington, D. C.
CHARLES NOBLE GREGORY, George Washington University.
AMOS S. HERSHEY, Indiana University.
CHARLES CHENEY HYDE, Northwestern University.
GEORGE W. KIRCHWEY, Columbia University.
ROBERT LANSING, Watertown, N. Y.
JOHN BASSETT MOORE, Columbia University.
GEORGE G. WILSON, Harvard University.
THEODORE S. WOOLSEY, Yale University.

Editor in Chief

JAMES BROWN SCOTT, Carnegie Endowment for International Peace,
Washington, D. C.

Business Manager

GEORGE A. FINCH, 2 Jackson Place, Washington, D. C.

EDITORIAL COMMENT

CONGRESS OF JURISTS AT RIO DE JANEIRO

By a convention signed at the Third International American Conference, at Rio de Janeiro, August 23, 1906, the American nations agreed to establish an "International Commission of Jurists," to be composed of one representative from each of the signatory states, for the purpose of preparing a draft of a code of public international law and a draft of a code of private international law, which should regulate the relations between the nations of America. It was further stipulated that two or more governments might appoint a single representative, but that such representative should have but one vote. The first meeting of the commission was to have been held in Rio de Janeiro in 1907,

but, owing to delays in the ratification of the convention and to other causes, the meeting did not then take place. In these circumstances an agreement was signed at Washington, on January 15 last, by the Governing Board of the Pan-American Union, by which it was provided that the commission should meet at Rio de Janeiro on June 26, 1912; and it was also agreed that each government might be represented "by two delegates instead of one, but with a single vote."

Pursuant to this agreement, the International Commission of Jurists met at Rio de Janeiro on the 26th of June. By the convention of 1906 the presence of representatives of twelve of the signatory states was necessary to the organization of the commission. At the first meeting, at which the delegate of Mexico presided, delegates from fourteen states appeared, as follows: America (United States of), John Bassett Moore, delegate, Frederick Van Dyne, technical delegate; Argentina, Dr. Norberto Quirno Costa, Dr. Carlos Rodriguez Larreta; Brazil, Dr. Eptacio Pessoa, Dr. Candido Luiz Maria de Oliveira; Chile, Dr. Miguel Cruchaga, Dr. Alejandro Alvarez; Colombia, Drs. José Maria Uricoechea, Roberto Ancizar; Costa Rica, Dr. Alejandro Alvarez; Ecuador, Drs. Alejandro Alvarez, Matias Alonso Criado; Guatemala, Drs. Antonio Batres Jáuregui, José Matos; Mexico, Dr. Victor Manoel Castillo; Panama, Gen. Dr. Don Santiago de la Guardia; Paraguay, Dr. Cecilio Baez; Peru, Dr. Hernán Velardo (an additional delegate, Dr. Alberto Elmore, subsequently appeared); Salvador, Dr. Alonso Reyes Guerra; Uruguay, Drs. Juan Zorrilla de San Martin, José Pedro Varela. Other delegates subsequently appeared, as follows: Bolivia, Dr. Victor Sanjinés; Cuba, Dr. Aniseto Valdivia; Venezuela, Dr. Pedro Manuel Arcaya. Seventeen states were thus finally represented in the congress; but a delegate from the Dominican Republic, Dr. Américo Lugo, was on his way to Rio de Janeiro when the congress adjourned.

The congress was formally opened on the evening of the 26th of June. Senhor Lauro Müller, Minister of Foreign Relations of Brazil, presided and made an address of welcome, to which the delegate of the United States responded. Dr. Eptacio Pessoa, first delegate of Brazil, was chosen as permanent president.

At the first ordinary session of the commission, which was held on the 28th of June, a motion was presented by the Chilean and Argentine delegations, as to the work which the commission should undertake and the methods by which it should be carried on. By this motion various questions were raised, including the question whether codification

should be effected by means of identical national laws or by means of international conventions; whether it should be at the first moment complete, or should be gradual and progressive, and in what form amendments should be made or defects supplied. For the consideration of these and other points, including that of the codification of rules of special interest to the nations of America, the motion proposed the appointment of a committee of five members, to collect the views of the delegations and to submit a report. This motion was seconded by the delegate of the United States, and was adopted, and the president of the Commission appointed the following committee: John Bassett Moore, Norberto Quirno Costa, Alejandro Alvarez, Hernán Velardo, and Candido Luiz Maria de Oliveira, representing, respectively, the United States, Argentina, Chile, Peru, and Brazil.

This committee became in reality a committee on permanent regulations, and in this capacity dealt with what proved to be the crucial question before the congress. This was the question whether the commission should, as the convention of 1906 seemed to contemplate, divide itself into committees and allot to them work for report at a future congress, or should at once proceed to adopt codes. A draft of regulations was presented by the Brazilian delegation, in which the latter course was proposed; and to this end two drafts of codes had been prepared, one on public international law, by Dr. Eitacio Pessoa, who is a member of the Supreme Court of the Republic, and the other on private international law, by Dr. Lafayette Rodrigues Pereira, a former Minister of Justice. The committee, however, after much deliberation, decided that in view of the magnitude and difficulty of the task before the commission, the attempt immediately to proceed to the adoption of codes was impracticable, but agreed, for the sake of harmony, to recommend the appointment of two special committees respectively to report drafts on Extradition and the Execution of Foreign Judgments. A draft on Extradition was subsequently adopted by the congress, but, the special committee on the Execution of Foreign Judgments having been unable to agree, its report was referred to another committee for report at the next congress.

The report of the Committee on Permanent Regulations embraced (1) a draft of permanent regulations for the government of the International Commission of Jurists when in session, (2) a plan for the division of the commission into six committees for the preparation of codes, and (3) a resolution fixing Rio de Janeiro as the place and June, 1914,

as the date of the next meeting of the commission. This report was duly adopted. Of the six committees appointed for the preparation of codes, four are to deal with questions of public international law and two with questions of private international law. The committees on public international law are to sit, respectively, at Washington, Rio de Janeiro, Santiago (Chile), and Buenos Aires. The committees on private international law are to sit, respectively, at Montevideo and Lima.

The places of meeting, subjects-matter, and personnel of the six committees are as follows:

I. International Law

1. Washington; Maritime War and the Rights and Duties of Neutrals: John Bassett Moore (United States), chairman: Frederick Van Dyne (United States), Victor Manuel Castillo (Mexico), Antonio Batres Jáuregui (Guatemala), José Matos (Guatemala), Alonso Reyes Guerra (Salvador), a delegate from Costa Rica (to be appointed in place of Alejandro Alvarez), General Santiago de la Guardia (Panama).

As this committee, if all the Central American states and Haiti and Santo Domingo should send full delegations, would greatly exceed any of the rest in number, it is empowered to divide itself into two committees.

2. Rio de Janeiro; War on Land, Civil War, and Claims of Foreigners growing out of such Wars: Eptacio Pessoa (Brazil), chairman: José Maria Uricoechea (Colombia), Hernán Velarde (Peru), a delegate from Cuba (who, it was understood, would be the Cuban Minister at Rio de Janeiro).

3. Santiago (Chile); International Law in Time of Peace: Norberto Quirno Costa (Argentina), chairman: Alejandro Alvarez (Chile), Victor Sanjines (Bolivia), Matias Alonso Criado (Ecuador).

4. Buenos Aires: The Pacific Settlement of International Disputes, and the Organization of International Tribunals: Miguel Cruchaga Torconal (Chile), chairman; Carlos Rodriguez Larreta (Argentina), Roberto Ancizar (Colombia), Juan Zorilla de San Martin (Uruguay). (Mr. Ancizar, it may be explained, resides at Buenos Aires)

II. Private International Law

5. Montevideo; Capacity, Status of Aliens, Domestic Relations, Succession: Cecilio Baez (Paraguay), chairman; Eusebio Ayala (Para-

guay), José Pedro Varela (Uruguay), Candido Luis Maria de Oliveira (Brazil).

6. Lima; Matters of Private International Law not embraced in the foregoing enumeration, including the Conflict of Penal Laws: Alberto Elmore (Peru), chairman; Pedro Manuel Arcaya (Venezuela), a delegate to be appointed by Bolivia, a delegate to be appointed by Cuba.

The regulation provides that if any of the delegates above named should resign or become disabled, the committee to which he was assigned shall request his government to fill his place; and that delegates appointed from countries not represented in the late congress, as well as any additional delegates appointed from countries that were so represented, shall be assigned by the president of the Commission in such manner as he may deem most conducive to the performance of the work.

With a view to the preparation of drafts of codes, it is provided that each committee shall request from each government a detailed report as to its domestic legislation, its judicial and administrative decisions, its conventions and practices, its international cases and their solutions, and as to the regulations which it deems most suitable, on the subjects with which the committee is charged.

It is proper to state that it seemed to be the general sense of the congress that the work in which the commission is engaged is not to be regarded as being of interest only to the American nations. While questions distinctively American may require distinctive treatment, the fact was also recognized that general questions of international law are necessarily questions of world wide concern, and that with regard to such questions the work of the commission will be essentially co-operative.

THE CONCENTRATION OF THE FRENCH FLEET IN THE MEDITERRANEAN AND THE TRIPLE ENTENTE

On September 13th the *Echo de Paris* printed an interview with Vice Admiral Germinet, formerly commander-in-chief of the French squadron in the Mediterranean, in which the distinguished naval officer approved the action of M. Delcassé, Minister of Marine, in concentrating the French naval forces, consisting of three squadrons, in the Mediterranean, and seemed to intimate that the policy of the French Government was based upon an agreement that in case of a war, in which the *Triple*

Entente — that is to say, France, Great Britain and Russia — should be allies, France should assume and maintain control of the Mediterranean, whereas Great Britain and Russia should concentrate their naval forces in the North Sea in such a way as to protect not only Great Britain but France from attack. The Admiral went so far as to say that the allied fleets would prevent their enemies — presumably the Triple Alliance — Germany, Austria and Italy — from entering the English Channel, by controlling the Straits of Dover, and he expressed his personal opinion that at the outbreak of war France and Great Britain would serve notice upon neutrals that the Straits of Dover would be considered as territorial waters from which neutral ships would be excluded during the war. The Admiral considered the concentration as peculiarly advantageous from a naval point of view, as well as from the standpoint of defense, for it would concentrate the French fleet in waters which were likely to be the scene of action and would secure the unity of command so necessary to naval success by having the entire French fleet thus concentrated under the direction of a single commander-in-chief.

It is better, however, to quote the material portions of the interview, rather than to rely upon a summary. Thus, the Admiral is reported to have said:

This concentration of our forces in the Mediterranean, which had been long under consideration, is good strategy. Since the *Entente Cordiale* the rôle of the French navy is clearly defined. It consists in gaining and holding the mastery in the Mediterranean. * * * We are playing strictly our own game, as it is our interest which we are defending. It is so much the better if the result is that we kill two birds with one stone and defend English interests as well. Besides, if we consider the eventuality of a war between Germany and England, or between the Powers of the Triple Alliance and the Triple Entente, the situation in the North would be analogous. The rôles would be reversed, in the sense that Great Britain, in defending its coast against the German navy, will assure at one and the same time the safety of our northern and western ports. The rule of the French navy in the North should be to close the Straits of Dover to every hostile fleet by means of the judicious and strategical disposition of our flotillas, and prevent the presence of a hostile fleet in the English channel. * * *

I go further and express to you my personal opinion: I am persuaded that upon the declaration of war, Great Britain and France, rightly considering the Straits of Dover as French and English territorial waters, will take steps to notify neutrals of the closing of the Straits of Dover. By this means the task will be simplified. We will know exactly with whom we have to deal. This is, in my opinion, an act of elemental defense and the absolute right of a belligerent.

The views of Admiral Germinet have been supported by his brother admirals, who have been interviewed and exploited in the French press. As is to be expected, the members of the Triple Alliance have devoted very great attention to the motives which appear to have dictated the concentration of the French fleet in the Mediterranean. It seems indeed strange that an admiral should talk so freely of the probable plans of his country in case of a struggle between the Triple Alliance and the Triple Entente, and that he should mention the prospective enemy by name. The incident will not tend to promote better feeling between Germany and France, and the tension between Germany and Great Britain will be increased rather than diminished by the apparent readiness of the Entente, if attacked by the Alliance. For however we may seek to delude ourselves, preparations for probable war are not the best means of maintaining peace. The consequences of concentration and the frank statement of the reasons for it were pointed out in the *English Nation*, in its issue of September 14th, as follows:

The country will hear with great surprise that practically the entire force of French battleships is in future to be concentrated in the Mediterranean, instead of being divided between that sea and the Channel and the Atlantic. Next month the six battleships of the third French squadron are to be transferred from Brest to Toulon, giving the French Admiral a force of eighteen battleships, including the new Dreadnoughts, and six cruisers. The *Temps*, the organ of the French Foreign Office, obligingly explains this movement as part of a combined arrangement under which Russia holds the Baltic and prevents the whole German Fleet from concentrating in the North Sea; we pen it up in that waterway, and, in conjunction with France, close the Channel, and bar the passage between England and Norway; while France "deals" with the "extreme left wing" of the German Fleet — *i. e.*, the Austrian and Italian squadrons. A more open and offensive statement of the naval side of the policy of "penning in" Germany could hardly be conceived. It points to a virtual naval alliance between France and ourselves, with Russia as a third (and slippery) partner. It seems to make an Anglo-German *rapprochement* impossible, and to open up a fresh and indefinite war of building programmes and counter-programmes.

THE MAGDALENA BAY RESOLUTION

Midway in the southerly third of the west coast of Lower California, and perhaps 3,000 miles from Panama, is a large bay. The back country is barren and thirsty, but on the shore and off it is moss which contains a dye and fish. Lumber and cattle are said to be possibilities also. An American company secured here from Mexico a large tract of land, several million acres, which border on the bay and run back from it.

This company was unprofitable. Its chief creditor, a New Hampshire lumberman, has taken it over and tried to secure himself by making a sale to certain Japanese subjects. Before concluding any bargain, however, his agent very properly consulted the United States Department of State to learn its attitude. This was adverse, it being aware of the outcry sure to be made if a Japanese coaling, fishery or other station or colony were to be established on our side of the Pacific. Nor did Mr. Knox look with more favor upon a sale limiting the ownership of the Japanese to a minority. The owner and creditor of the concession seem to have sought Japanese aid in colonization because no other labor there was available. The Japanese Government had nothing whatever to do with the scheme. Moreover by Mexican law no concession holds good under heavy penalty, if transfer is sought by the concessionaires to a foreign government.

This was the situation then when the susceptibilities of the Senate were aroused last July, and Mr. Lodge introduced the following Resolution:

Resolved: That when any harbor or other place in the American continent is so situated that the occupation thereof for naval or military purposes might threaten the communications or the safety of the United States, the Government of the United States could not see without grave concern the possession of such harbor or other place by any corporation or association which has such a relation to another Government not American as to give that Government practical power of control for national purposes.

It is understood that in secret session for the last word but one "national" was substituted "naval or military."

A Senate resolution is an expression of its opinion. This resolution was intended to be an announcement of national policy to foreign Powers. It was introduced after information had been sought from the President on the subject. This went to show that the conduct of other Powers in regard to those lands had been entirely correct. In the discussion which led up to and which followed the introduction of this resolution it appeared that its mover chose not to regard it as an extension of the Monroe Doctrine but as based upon the law or right of self-defense which is fundamental, the Agadir incident being a precedent. But in Africa, the German action was official, governmental. Whereas at Magdalena Bay, as Senator Rayner had well brought out in May, it was a question of private commercial use only. Has the United States a right to assume that private commercial use of such a harbor as this, could be so easily converted into government use as to warrant its prohibition before

any sign whatever of abuse or of danger was visible? That the Senate so believes is clear, for it passed the Lodge resolution. That the legal mind shares this view is not so clear. Let us state it in general terms. On the ground of self-defense a state may forbid its neighbor to sell lands of strategic value to the private subject of a third Power, there being no act, but mere suspicion to warrant the fear that the third Power will make sinister use of its subjects' property. What becomes of the sovereign right of the neighbor to dispose of its lands, for commercial development? If the principle of self-defense is unduly stretched, will it not break down and become ridiculous? Is an attitude of constant suspicion consistent with international good-will? These are doubts which fairly arise from the Lodge resolution.

THE CHRISTIANIA MEETING OF THE INSTITUTE OF INTERNATIONAL LAW

The Institute of International Law held its annual session at Christiania from August 24th to and including August 31, 1912, and the meeting was in every respect highly successful. Two projects were adopted — one dealing with the conflict of laws, namely, the regulation of conflicts of law in matters of real rights in the case of bankruptcy; and a second dealing with international law, namely, the effects of war on treaties and international conventions.¹

It would be unfair, however, to judge the session by the projects actually adopted, for the discussion which they underwent was searching and valuable, and forms not merely a commentary upon the text, but furnishes the reasons as well. It had been expected that M. Fauchille's elaborate report concerning the laws and customs of maritime warfare between belligerents would be discussed. This project is in the form of a code. M. Fauchille unfortunately was not able to be present, and the Institute decided that it was inadvisable to discuss the project article by article. It did, however, indicate its views as to the form and content of the project, and referred it to M. Fauchille as reporter, in order that it might be revised in accordance with the views expressed at the Christiania session. It would seem probable that an acceptable manual dealing with the subject will be presented at the forthcoming session, to be held at Oxford. If this should prove to be so, to the Oxford manual of land warfare there would be added the Oxford manual of naval warfare.

¹ An editorial comment in the next (January) number will be devoted to the effects of war on treaties and conventions.

At the Paris session of 1910 a committee was appointed to consider and report to the Institute projects which should properly appear in the program of the Third Hague Conference, and which the Institute should study in advance of the Conference. Among these was the question of the court of arbitral justice, the establishment of which the Conference recommended as soon as an acceptable method of appointing the judges should be reached through diplomatic channels. The committee was composed of the following members: Messrs. von Bar, Fauchille, Fromageot, Hagerup, Holland, Renault, Edouard Rolin, J. B. Scott, and Westlake. They met on October 6-7, 1911, and, among other matters, expressed themselves in favor of the establishment of the court of arbitral justice, and so reported to the Institute. A large part of the afternoon of August 29 was devoted to the recommendation of the committee. The question of the advantages which a permanent court of arbitral justice would render in the judicial settlement of international disputes and in the development of international law was discussed by various members, who are not only interested in judicial settlement but who have had experience with international arbitration; such as, Dr. Lammash of Austria; Mr. Gram of Norway, who as far back as 1892 was a member of the Bering Sea Commission, and has since served both as member and president of arbitral tribunals; Mr. Hagerup, umpire in the recently decided Cerruti case; and J. B. Scott. After a lengthy discussion and a full exchange of views, the Institute unanimously recommended the establishment of the court of arbitral justice as voted by the Second Hague Conference in 1907.

The importance of this action can hardly be overestimated, because it is the first time that the Institute has pronounced itself squarely in favor of the institution of the court of arbitral justice, and the importance of the favorable action is enhanced by the fact that the publicists who participated in the proceedings and the vote represent fourteen different nations. Had the Institute done nothing more than approve the court of arbitral justice, it would have justified the Christiania session, for the deliberate judgment and approval of the Institute as a body of the need of the court of arbitral justice and of the advantages to be derived from its successful operation, is in itself an international event of capital importance.

It is perhaps not generally known that the bureau of the Institute had consented to serve as general adviser to the Division of International Law of the Carnegie Endowment for International Peace. This action,

of course, required the ratification of the Institute. The question was carefully considered at the Christiania session, and it was unanimously decided that the Institute should accept the invitation of the Carnegie Endowment to act as general adviser to the Division of International Law, and that a special committee of the Institute should be appointed to represent it, as appears from the following resolutions:

The Institute of International Law, assembled at Christiania the 26th of August, 1912, accepts the title and functions of General Adviser of the Division of International Law, offered to it by the Trustees of the Carnegie Endowment. It is happy to take part, in conformity with its constitution, in the work undertaken under the auspices of the illustrious American philanthropist for the development of international law.

The Institute of International Law, assembled at Christiania the 26th of August, 1912, begs Mr. J. B. Scott to express its deep gratitude to the Trustees of the Carnegie Endowment for the confidence which they have shown in the Institute by entrusting it with the title of General Adviser of the Division of International Law and for their generous assistance in the organization of the session of Christiania.

The Institute of International law, because of its acceptance of the title and functions of General Adviser of the Division of International Law of the Carnegie Endowment, has decided upon the creation of a special consultative committee of ten members, of which the Secretary General of the Institute shall also be a member *ex officio*. This special consultative committee shall act until the opening of the next session of the Institute of International Law; on the one hand, as General Legal Adviser of the Division of International Law of the Carnegie Endowment, and on the other hand, as a commission of study entrusted with the elaboration of a project, to be submitted to the Institute, for the regulation of the relations to be established between the Carnegie Endowment and the Institute of International Law.

In case one of the members of the special committee should be prevented from taking part in its work, the committee shall be empowered to appoint, upon the proposal of the titular member so prevented, a substitute to take his place temporarily. No one shall be chosen as a substitute member, unless he appears upon the list of eighteen names from which the definitive special committee was formed.

The committee appointed to act as a consultative committee until the next session of the Institute, to be held at Oxford, is composed of the following members: Messrs. Hagerup, von Bar, Lammach, Holland, Renault, Asser, Sr., Lardy, Fusinato, Gram, Vesnitch, and the Secretary General of the Institute, M. Albéric Rolin.

The desire of the Trustees of the Carnegie Endowment was to secure the best available advice for the Director of its Division of International Law, so that the projects undertaken by this Division of the Endowment should, in the opinion of those most competent to decide and representing various countries and various points of view, be calculated "to aid

in the development of international law and a general agreement on the rules thereof, and the acceptance of the same among nations"; "to establish a better understanding of international rights and duties and a more perfect sense of international justice among the inhabitants of civilized countries"; "to promote a general acceptance of peaceable methods in the settlement of international disputes."

It is hoped that the co-operation of the Institute of International Law, through its consultative committee, will not only prevent mistakes on the part of the Division of International Law, but will enable this Division to undertake and carry out projects which are of fundamental importance, but which lack of means has hitherto prevented.

Any account of the Christiania session would be faulty in the extreme, did it not mention the address of welcome of Mr. Irgens, Norwegian Minister for Foreign Affairs, and the presidential address of Mr. Hagerup. The Institute was awarded the Nobel Peace Prize in 1904, and, as each laureate is expected to appear in Christiania and deliver an address, the Christiania session was of special interest to the good people of Norway as well as to the members of the Institute. In the course of his address Mr. Irgens stated in felicitous phrase the purpose of the Institute, and referred to the award of the Nobel Peace Prize thus:

The noble aim of the Institute — to further the progress of international law — is in itself of a nature to awaken a most sympathetic echo and meet with the keenest interest among all civilized nations. The progress of the idea of justice among peoples will contribute materially to the preservation of peace between States. The field of action of the Institute comprises the two domains of international law: on the one hand, the Institute exerts itself to develop, in public international law, peaceful relations between nations and to make the laws of war more humane; on the other hand, its aim is to lessen or remove, in private international law, the inconveniences which result from the existing differences in the legislation of the several countries.

* * * * *

Justitia et pace — that is the noble device of the Institute. But, if in our time of hurry and ceaseless activity, the average man still indulges in meditation, I believe that what will strike him the most in this device is its last word. By a happy coincidence the Institute is now holding its meetings in the building of the Norwegian Nobel Institute. You are not unaware of the fact that the noble Swedish donor bequeathed, in his will, to the Norwegian Storting the honorable task of distributing each year one of the five Nobel prizes — the Peace Prize — which is awarded to "the person who shall have done the most or the best in bringing about fraternity among peoples, in abolishing or reducing standing armies, as well as in organizing and increasing peace congresses." When in 1904 this prize was awarded to the Institute, which we have to-day the honor of seeing assembled in this hall, the selection was greeted with general approbation, not only in our own but in every country.

By this prize the Norwegian people learned to know the Institute even better than before; and the news that the Institute had accepted our invitation to hold its session this year among us was received with joy.

The character of Mr. Hagerup's address was determined by the fact that the Institute had received the Nobel Peace Prize, and that its session in Christiania was due in part to this circumstance. He therefore devoted a great deal of attention to the question of international peace, and more especially to arbitration as a means of settling peaceably international disputes. He declared himself whole-heartedly in favor of arbitration, but called attention to the fact that all disputes between nations were not of a kind to be arbitrated; that certain questions were properly reserved from the obligation; that arbitration would perhaps make greater progress if it were considered without undue enthusiasm and analyzed as any ordinary remedy would and should be. He laid particular stress upon the fact that arbitration was at best but a means to justice; that peace depended upon the administration of justice; and that, therefore, principles of pacific settlement would render the greatest possible service by seeking to introduce justice in the foreign intercourse of nations.

At the morning session of August 24th, before the formal opening of the Institute in the afternoon, General den Beer Poortugael was made an honorary member; Messrs. Rouard, de Card, Sir John Macdonell, and Diena were elected members; Messrs. Blocizewski, Nolde, von Plener, Elihu Root, Vallotton, and Wedel were elected associates; Messrs. Lammasch and J. B. Scott were elected Vice Presidents. At the closing session on August 31st it was decided to accept the invitation of the English members to meet in the summer of 1913 at Oxford. Professor Thomas Erskine Holland, formerly Professor of International Law and Diplomacy at Oxford, was elected President and M. Vesnitch of Servia was chosen First Vice President for the session of 1913.

An account, however brief, of the Christiania session would be inadequate, did it not mention the hospitality of the Norwegian people, as represented by the royal family, the city of Christiania, and private citizens. His Majesty, King Haakon, attended in person the opening session of August 24th, and remained as an interested auditor until its conclusion. On the 27th the King and Queen gave a banquet at the Royal Palace to the members of the Institute, and followed it by a reception, in which they made their personal acquaintance. The government gave the members the freedom of the port and placed the

railroad at their disposal from the first of August to the 15th of September, in order that they might visit places of interest, come into contact with the people, and admire the magnificent scenery of the country. The city of Christiania gave a dinner on the evening of the 29th. The Royal Opera House invited the members and their families to *Madame Butterfly* on the evening of August 30th, and on September 1st Mr. Halvorsen, Director of the Navigation Company, and Mr. and Mrs. Thallaug, arranged an excursion from Christiania by railway and upon Norway's inland sea, Lake Mjosen, to Lillehammer, where the members were met by Mr. Gram. They were then driven to the outskirts of Lillehammer, where the little school-children were drawn up to greet them. The members were then shown the remarkable collection which illustrates the construction of Norwegian houses from remote times. The hospitality was elaborate but sincere, and the impression left upon the members was that of a beautiful country and a brave people, who deserve the independence of which they are justly so proud.

THE EMPEROR OF JAPAN

His majesty Mutsuhito, Emperor of Japan, died in Tokyo, July 29, in his sixtieth year, having been born November 3, 1852. His remarkable achievement in the transformation and upbuilding of the Japanese nation, in effecting her entrance into internationalism and establishing her "place in the sun," renders it highly proper that some tribute should appear in a journal of international law.

For many reasons the late emperor will occupy a unique place in history. There is no other recorded instance in which a sovereign was able, within a single generation, to lift his country by the inspiration of his own prevision and purpose, and favored by a combination of circumstances, out from one stage of civilization into another, through a peaceful revolution which was at once political, social, economic and industrial in its character. The semi-divine attributes with which his devoted people invested their Emperor, are not difficult to understand, for rarely if ever has it been given to any monarch to do for his people what Mutsuhito has done.

He was sprung from the oldest unbroken dynasty in the world; he spoke of himself in the declaration of war against Russia as "seated on the same throne occupied by the same dynasty from time immemorial."

This was the exact fact, whether or not he was, as Japanese tradition declares, the one hundred and twenty-second monarch of the line; for the records carry that line back to 660 B. C., or more than twenty-five hundred years. Thus this splendid embodiment of the best type of the modern spirit of Western civilization was a direct connecting link with the remotest Oriental antiquity.

The story of the uplifting of Japan reads like a tale from a fairy book. It is the only recorded instance in history where the feudal system was voluntarily surrendered; where a constitutional parliamentary government was established by the voluntary action of an hereditary despotism. The Magna Charta which the English knights wrested from King John by force and duress of arms, came to the people of Japan as a free gift, and without their asking. Not all the credit of the rescue of Japan from the rule of the Shōgun belongs to the Emperor, and not any of it did he ever personally claim. From the beginning to the end of his reign he was surrounded by as remarkable a group of statesmen as lived and labored in any country during the same period of time. The Emperor found them, trusted them, was guided by them, but always his own clear discernment, fine courage and firm purpose guided them as well. Prince Ito, whom he did not long survive, was the Bismarck of Japan, in times and stresses which required an iron chancellor just as did the unification of the German Empire; but they also required their William I.

The character and career of the late Emperor were the more remarkable, because of the peculiar training, or lack of training, of his youth and the first years of his reign. He was the last of the "hermit emperors." Always secluded in the palace at Kyoto under the system of the Shōgun dynasties, the emperors had for two and a half centuries been excluded from all share in affairs of the state and from all contact with the people and with life. The founder of the Tokugawa dynasty of Shōguns had given the extreme effect to the theory of the Emperor's sacro-sanctity, by converting the court at Kyoto into a cloister, whence the Emperor might never emerge, whither no feudatory might enter, nor any petition penetrate. Fortunately he began his reign, at the age of twelve, under the guidance and instruction of a regent who was wise and liberal minded. It was at the time when the anti-foreign agitation in Japan had reached its height, and the question of the continuance or abandonment of the exclusion policy was dividing the daimyos and shaking the fabric of government to its foundations. When Mutsuhito was but fifteen years of age, the *coup d'état* occurred, the Shōgunate was abolished, and the

child Emperor begun the exercise of his sovereign functions. It was indeed fortunate for him and for his country that in those critical and turbulent times he was able to surround himself by that group of young and broad-visioned statesmen who confronted with him the problem of the rehabilitation of Japan.

It was in 1853 that Commodore Perry had appeared off the shores of Japan with his four ships of war, and in 1854 that he returned to the United States carrying the first treaty that Japan had negotiated with any foreign country in modern times. We may trace to Perry's statecraft and determination the beginning of the friendly relations between the two nations which have remained unbroken. Our country is thus forever associated, in the minds of the Japanese people, with their emergence from the traditional isolation which marks the beginning of the new era. In the meanwhile Japan's ports still remained closed to foreign countries, until it fell to the lot of another citizen of the United States, Townsend Harris, the first American consul-general to Japan, who secured a treaty in 1857 under which Yokohama was opened in 1858, and thereafter commerce between the United States and Japan was freely carried on there. It was not until February 14, 1868, that an imperial decree announced to the world that "it had been definitely resolved, after a court council, to have treaties of amity with foreign Powers." By that decree, the "hermit kingdom," the sacred face of whose Emperor had been hidden from all men for centuries, proclaimed her entrance into the family of nations; from that date began her rapid absorption and assimilation of the best features of Occidental civilization. Looking back upon these events, having in mind the tremendous antipathy to all things foreign which had so long been the distinguishing characteristic of the Japanese mind, it seems incredible that the about-face should have been accomplished with so little disturbance, and that it could have been so rapidly and so quietly followed by other innovations equally startling. The long struggle which followed, before Japan succeeded in wresting from the reluctant Occidental nations the full recognition of her right to participate in international relations upon an equal footing with all other countries, constitutes one of the most interesting, dramatic and epoch-making events in international history. The commercial treaties that Japan subsequently negotiated exempted foreigners residing within her borders from the operation of her criminal laws and secured to them the privilege of being arraigned solely before tribunals of their own nationality. This was held to be a necessary condition, as regards the

citizens of Christian states residing in non-Christian countries, and it led to the establishment of the consular courts. It was this implication that the nation was unfit to exercise one of the fundamental attributes of every sovereign state, that of judicial autonomy, that the Japanese so bitterly resented; and it may be said in passing that it was the determination to prove herself worthy of this function which led to the complete reorganization and reform of the Japanese judicial system and procedure, to the founding of law schools and to the training of a bar that is to-day the equal of those of other lands. Japan first asked for the revision of the treaties and the abolition of consular jurisdiction, in 1871. Never yet had an Oriental state received at the hands of the Occident the recognition thus demanded; and the negotiations dragged along through eleven years before she finally secured it. It constitutes another tie of peculiar significance between Japan and the United States that our government was the first nation in the world to recognize the justice of Japan's demand. This was in the treaty of 1878; but the condition was attached that the treaty should not become operative until the other treaty Powers had also accepted the principle. It is authenticated history that this condition was inserted at the request of Japan, whose statesmen were wise enough to recognize the necessity of making haste slowly, while the reorganization of her judicial system was being tested. It thus became the fact that the United States dictated the terms of the first treaty conceding consular jurisdiction to Japan.

And so the marvelous panorama of Japanese regeneration continued to unroll itself before the astonished eyes of a skeptical world. Feudalism was abolished, or rather, abolished itself, in 1869, by the voluntary surrender by the samurai of their fiefs, praying the Emperor to reorganize and bring them all under the same system of law, — a sacrifice which alone averted a bloody internal upheaval, and was indeed a noble act of patriotism, which stands without any parallel in history. A recent writer explains it by reference to the "deference of the Japanese samurai to certain canons of almost romantic morality."

Acting always under the guiding hand of the Emperor, the army and navy were rehabilitated and reorganized on European models. The banking system was revised. Private railways were nationalized and rapidly extended. The gold standard was established in 1885, thus placing the rapidly developing commerce of the country on a stable basis of exchange. The educational system was fundamentally remodelled on the basis of free compulsory primary education, and chiefly

under the sympathetic guidance of trained American experts. The first president of the Imperial University at Tokyo was our own adopted son, Dr. Guido Fridolin Verbeck. Tariffs were established under which the industrial development of the country was enormously stimulated along Western lines. Side by side with all this economic and educational advance, had been going on a finer, subtler, popular uplift, which Griffis summarizes: "A nation moved, toleration won, fanaticism received its death-blow, a Christian Church organized, persecution abandoned, priestcraft rebuked, Buddhism disestablished, and civilization in its thousand forms adopted."

Finally, and crowning the whole splendid edifice of nationalism, a constitutional representative government was established, not in response to any popular demand, but solely as the result of the Emperor's insight into the logical evolution of a government founded upon Western ideals. By a stroke of his pen, the suffrage was bestowed upon millions of Japanese citizens, the Diet was created, and the control of the local governments was placed in the hands of the people. The experiment was not undertaken without misgiving on the part of many; its ultimate outcome was long thought to be doubtful, but is so no longer. The first Japanese Diet opened its session on November 27, 1890, not yet a quarter of a century ago; and it can be safely said that in the dignity of its procedure, the quality of its legislation, and especially in the direct and expeditious manner in which it accomplishes its work, the Japanese Diet is the peer of any Western parliament.

During the forty years in which this marvelous transformation was moving steadily forward, Japan was the victor in two wars. That with Russia was the greatest war of modern times; and was the method which Japan took, or was forced to take, to notify the world that she must henceforth be treated as an equal by the most powerful nations. The patience, the financial sacrifices, the skill and study with which army and navy were prepared for that titanic struggle; the astonishing courage and endurance of the Japanese soldiery in trench and in battle; and the marvelous seamanship and fighting capacity which accomplished the destruction of the Russian navy, opened the eyes of the world, and rank among the phenomena of history. It was as if Japan, like Minerva, had sprung full armed from the head of Jove.

The most important events in Japanese history since the war with Russia have been the annexation of Korea and the negotiation of treaties and agreements with Great Britain, France, Russia and the United States,

to insure the independence and integrity of the Chinese Empire, and the principle of equal opportunities for the commerce and industry of all nations in China, — that is to say, of the American doctrine of the "open door." The exchange of notes between Japan and the United States, dated December 1, 1908, had all the effect of a treaty; was a final solution of the difficulties which had been pending for several years between the two countries; and was the happy culmination of plans inspired by Secretary Root some two years earlier, in continuation of the policy inaugurated by John Hay in 1900.

With the Emperor's death ended the Meiji era in the history of Japan, — meaning "the era of enlightenment." It covers a period of forty-five years and six months. No nation that exists has compressed so much history within a period so brief, or effected an evolution which bears such a momentous relation to the future history of the world. Whether the Occidental and the Oriental civilizations are to antagonize, and there is to ensue a titanic struggle for the supremacy of one over the other; or whether these two civilizations are to coalesce and intermingle and co-operate, for the development and the ultimate triumph of the idea of international unity, remains to be seen; but if "that far-off, divine event" shall ever come about, the career and the character of Mutsuhito will stand at the very front of the great things of earth that have made it possible.

THE AMERICAN INSTITUTE OF INTERNATIONAL LAW

On October 10, 1911, a proposition was made by Mr. Alejandro Alvarez, of Chile, and Mr. James Brown Scott, to establish an American Institute of International Law, which, if successfully launched, would do in a lesser degree for international law, as far as the American States are concerned, what the Institute of International Law has done for the states at large. A circular letter was prepared and sent to representative publicists in each of the American countries, in order to see whether the project met with the approval of those who might properly be considered as representative of public opinion in their respective states. The circular (a copy of which is appended to the present comment) called attention to the fact that, however the states of the American continent may differ in their origin, their forms of government are so similar and they are so separated from the Old World that they may well be considered as forming a distinct unit, as is indicated by the name

Pan-America, which is commonly used to distinguish them as a whole. This identity of interest, or solidarity of interest, to use an expression much in vogue, is indicated by the fact that the American states have held at intervals since 1889 a series of reunions known as Pan-American Conferences, and there has been established in Washington as the organ of the states of the Western Hemisphere a bureau known as the Pan-American Union. The Conferences are political and the Pan-American Union is a diplomatic body directed by a governing board, in which the states as such are represented. The Conferences and the Union are therefore official bodies, and the representatives act under instructions from their governments. They are not private or voluntary associations, in which the members discuss problems of common interest according to their individual judgments and reach conclusions based upon the individual views of their respective members. They render great services, and their influence in the future is bound to be greater than in the past. It was felt, however, that a strictly private or voluntary association, composed of representative publicists, untrammelled by instructions from their governments and free to exercise their individual judgments, would not only bring the representatives of enlightened thought of the different American countries into close and intimate contact, but that the various problems, which exist of necessity and which must arise in the mutual intercourse of the American nations, might properly be discussed in the light of the general principles of international law, and solutions proposed either consistent with the general principles or with necessary or logical development.

There is, of course, no American international law, in the strict sense of the word, for the essence of international law consists in the fact that it is universal, not the rule of conduct of one or two, or even of a group of states. There are, however, problems which may properly be considered as American, in the sense that they either do not exist elsewhere or are not of such importance. A scientific discussion of these problems and the formulation of principles of law by which they should be decided, whether such principles actually exist or are the consequence of existing principles, that is to say a development of existing principles, furnish ample employment for the best brains of Pan-America. Even if the proposed Institute were not in the beginning so successful as its proposers hope, the meeting at stated times of publicists from the different American countries would be in itself an unmixed good, and would go far to justify the creation of the Institute. Personal acquaintance

would beget confidence, and exchange of views strengthen an interest where it existed and create it where it was lacking.

But the proposers of the Institute have had in mind something more than the scientific study and development of international law, however important this may be, or bringing together the Americans chiefly interested in international law, however profitable this would undoubtedly be. Their purpose also is to popularize international law in every American country by the creation of a national or local society, which would enter into relations with the Institute and from whose members the Institute would be composed, as appears from the second circular letter (that of July 4, 1912) which is annexed to this comment.

The American publicists who have been consulted have, without exception, expressed themselves as strongly in favor of the proposed Institute, and representative European publicists, all of whom are members of *l'Institut de Droit International*, have not only privately approved the project, but have publicly confessed their faith in a series of opinions which have appeared in the *Revue Générale de Droit International Public*.^{*} Approval, however, of the project has not been limited to what may be considered private sources or private bodies, for the American jurists, at their recent meeting at Rio de Janeiro, to consider the codification of international law, formally approved the creation of the proposed Institute.

The constitution and by-laws have been prepared and will be published later, when the Institute has been definitely organized, and it is expected that a meeting of the members will be held in the course of a twelvemonth. As the JOURNAL goes to press, news has been received that the Mexican Society of International Law, to be affiliated with the proposed Institute, has been organized in Mexico, through the initiative of Señor Casasus, formerly ambassador to the United States, Señor de la Barra, formerly ambassador to the United States and Provisional President of Mexico, and Señor Romero.

^{*} See the opinions of Messrs. de Lapradelle in the *Revue Générale de Droit International Public* (1912), Vol. 19, pp. i-vii; von Bar, *ibid.*, p. 329; Cattellani, *ibid.*, pp. 329-331; Dupuis, *ibid.*, pp. 331-332; Fauchille, *ibid.*, pp. 332-334; Lammasch, *ibid.*, pp. 334-335; Politis, *ibid.*, pp. 335-337; Alberic Rolin, *ibid.*, pp. 338-342; Weiss, *ibid.*, pp. 342-343; Westlake, *ibid.*, pp. 343-344.

PROJECT FOR THE CREATION OF AN AMERICAN INSTITUTE OF INTERNATIONAL LAW

PARIS, October 10, 1911.

The bond of union between the States of the New World is the true characteristic of their external relations. It has manifested itself from the first days of their independence and has grown in strength from that time on.

America is separated from the Old World by its political traditions. The States which compose it have organized their governments under a republican and democratic form, and their constitutions have a common foundation. If they are alike in their political organization, they are also alike in their common interests. In order to regulate these interests, Pan-American Conferences have been held; and in order to develop and protect them, the American States have created, at Washington, a Pan-American Union in which they are all represented. It is, therefore, with reason that America is called the New World.

In order to maintain this bond of union which is the result of their political character and historical traditions, and in order to develop what may be called the American conscience, there are at present only official bonds. These are insufficient and there must be created between the States of America an intellectual bond as well. The united efforts of jurists who are well learned in international law will contribute, no doubt, greatly to this end.

The necessity of studying scientifically international relations in order to bring them in harmony with the needs of the modern society has been understood from the last third of the nineteenth century. It was at this period that Calvo and Lieber in America, Bluntschli and other prominent publicists in Europe, suggested the idea that a body of jurists should give themselves up to the scientific study of international law. Following out that idea, Rolin-Jaequemyns, in 1873, sent a confidential note to the principal publicists in which he called attention "to the necessity, the possibility, and the opportunity of inaugurating, by means of *diplomatic action* and of *individual scientific effort*, a new and third factor in international law, namely, *collective scientific action*." To this end he proposed to hold an international meeting or conference which should have for its object the creation of an academy or institute for the study of international law, and for the scientific development and application of that law to cases that might arise. Almost unanimously the persons consulted were favorable to the idea of M. Rolin-Jaequemyns, and, as a result, the Institute of International Law was born. Its labors along different lines have contributed to the development of international law; its resolutions have served and still serve as models for the agreements or conventions signed by different States; they have aided, particularly, in bringing about international conferences and notably the Second Peace Conference.

While these efforts were meeting with such great success in Europe, America remained in the background, contented, on its part, to receive the advice of European publicists.

The States of America, in standing forth as independent nations in the international society, have changed its character and have exercised a very great influence upon international relations, and even upon the progress of international law. It has even been possible for them to formulate and to codify in their application certain principles of law which, at that time, were hardly applied in Europe. Their influence

has modified principles generally accepted. They have been able, also, to set forth principles upon a number of points with regard to which it is not yet possible to obtain a world-wide agreement. Finally, the American States have had their own peculiar problems and situations as a result of their geographic position or their birth to political life.

There is need, therefore, of an *American Institute of International Law* similar to that which has been founded in Europe, and with which it would be in intimate relations without, however, duplicating it.

The object of this Institute would be indicated by its very nature; it would be public international law in general. This study, while contributing to point out the significance and nature of international relations, would tend more particularly to popularize them; it would tighten the bonds between States by bringing them closer together in a spirit of justice, thus the maintenance of peace would be greatly advanced.

Entirely apart from the political rivalries of Europe, and separated from it by their geographic position, the States of America, free from all antagonism among themselves, have had and can have, on many questions, just and impartial views upon international relations.

The Institute would also propose to discuss problems peculiar to America, that is to say, those which have a special interest for our continent, in order to endeavor to give them a solution in harmony with general principles, universally accepted, if that is possible, or to enlarge these principles and even develop them in conformity with the express or tacit desire of the American States, and the fundamental principles of law.

It would, finally, undertake to publish in a special collection all the diplomatic documents, both of the past and the present, which may be of interest to the States of the New World. All these documents will be published both in their original text and in a French translation, in order that they might be available to all persons who might have use for them. Although it has been sought to intrust this task to other institutions, one association alone, such as that which we are proposing, can undertake it successfully.

The Institute, after the example of the *Institute of International Law*, should be exclusively scientific in character. All political design and all political influence should be excluded from its undertakings. In consequence, no question which relates either directly or indirectly to political questions pending between the American States, could be the object of discussion. As to other questions, they should only be studied from the legal and practical point of view.

To this effect it will be necessary to consider the relations of international law, not from an abstract but from a practical point of view, that is to say, to consider the needs of the whole international society and the tendency of the universal juridical conscience. On this foundation practical solutions will be sought for, of a character to which no resistance can be made, and which will not injure the interests of the States, and which will be easy to carry out.

In order to complete usefully the work of the Institute, local societies could be created in each State, and it would be desirable, in order to maintain equality, that all the States should be represented in it.

The Institute should also have journal correspondents who could, by their learn-

ing, contribute usefully to the common work. The undersigned, after having consulted eminent publicists of America and Europe, and after mature reflection on the advantages and difficulties of carrying out such an undertaking, are persuaded that an organization in America of an institute of the kind above pointed out, would render the greatest service to our continent.

In advance we are of the opinion that it would be well to provoke an exchange of views with distinguished jurists in America, by choosing, first of all, one person in each of the States.

With this object in view, we take the liberty to address you the present note, which is strictly confidential.

In reply we ask of you to be good enough to communicate to us whatever ideas may be suggested to you by this note.

If the majority of answers is favorable to the creation of the Institute, we think that a preparatory meeting could be held either in Washington or at Paris as soon as possible — March or April of the coming year.

On our part, we think that Washington would be the better place because at the end of April, there is to be held in that city the Sixth Annual Meeting of the American Society of International Law. Although the Institute should be entirely independent of that association, it would be convenient if the two meetings could take place at about the same date.

In the hope that you will be good enough to examine attentively the proposal which we have just submitted to you, and that you will give us your answer as soon as possible, we remain, etc.,

JAMES BROWN SCOTT,

*Former Solicitor of the Department of State of the United States.
Former Professor of Law at Columbia University of New York.
Editor-in-chief of the American Journal of International Law.
Member of the Institute of International Law.*

ALEJANDRO ALVAREZ,

*Former Professor of Law in the Faculty of the University of Chile.
Solicitor of the Department of Foreign Affairs of Chile.
Member of the Permanent Court of Arbitration at The Hague.*

CONFIDENTIAL NOTE

2 Jackson Place,

WASHINGTON, D. C., July 4, 1912.

My dear Sir and Colleague:

On October 10, 1911, I had the honor to write you a letter, enclosing a project for the creation of an American Institute of International Law and requesting your very valuable co-operation. Similar letters were also sent to other publicists of wide reputation. Favorable replies have been received to all these letters, showing that in the opinion of competent jurists and publicists of Pan-America the creation of the proposed Institute was eminently desirable. The project has been also submitted to a number of European publicists enjoying the highest distinction in their own as well as in foreign countries, and without exception they have expressed them-

selves strongly in favor of the proposed organization. Enclosed you will find copies of the various opinions, so that it will appear beyond the possibility of doubt that the proposed Institute meets with the approval not merely of American but of European publicists, and the failure to carry out the project would be a source of disappointment among the most competent and progressive publicists of the Old as well as of the New World.

The proposers of the project are therefore not merely encouraged to continue their efforts by the promised co-operation of the American publicists to whom the Confidential Note of October 10, 1911, was sent, but they feel it their duty, in view of the widespread approval of the proposed American Institute of International Law, to take the necessary steps to secure its establishment and successful operation. I therefore have the honor to enclose, on behalf of Mr. Alvarez, as well as on my own behalf, a draft of the Constitution and By-Laws of the proposed Institute. I would call your attention to the fact that each instrument is based upon and follows as closely as possible the Constitution and By-Laws of the Institute of International Law. The aims and objects of each Institute are largely identical; but in the formal statement of the aims and objects of the American Institute, the part that treats of war is of secondary importance, as the proposers believe that the principles of international law are generally applicable and should be studied and developed so as to maintain the status of peace, which so fortunately exists between the American Republics. The proposers of the Institute also believe that it can best serve the cause of international law by devoting itself primarily, if not exclusively, to a consideration of the principles of law and justice which regulate the intercourse of nations, more particularly the American Republics; and that the Institute would perform the greatest possible service to humanity by considering the various means and agencies and by devising the machinery by which the normal relations of nations, based upon law and justice, might be maintained, instead of dissipating its energy by seeking to regulate war or to lessen its hardships. Other scientific bodies and writers of authority may be trusted to consider warfare in its various aspects. The American Institute may well take peace and peaceful relations for its province, although it may properly discuss questions of war, the rights and obligations of belligerents, and neutrality.

In the next place, it has been thought best to profit by the experience of the Institute of International Law, gained in the forty years of its existence, by adopting, with slight modifications, those provisions of its Constitution and By-Laws which have justified themselves. There is, however, a third reason, which would have suggested the utilization of the Constitution and By-Laws of the Institute of International Law, namely, the desire on the part of the proposers to show their appreciation of the Institute by the general adoption of its Constitution and By-Laws, so that it might appear evident at a glance that the American Institute is seeking to follow where the European has led, and to co-operate, not to compete or engage in rivalry.

It will be noted that the proposed Constitution is democratic, and that the American Institute is based upon the principle of federation. It is democratic in the sense that the American Institute is to be composed of an equal number of publicists from each of the Republics of the Western Hemisphere, and that the members are not to be chosen arbitrarily by the American Institute, but upon the recommendation of the publicists of each of the American Republics.

In the next place, the American Institute is founded upon the federative principle, because it contemplates the establishment and separate existence of national societies of international law in every American Republic, that such national societies shall be considered branches, and that their members shall be considered as of right associate members of the American Institute. The members of the American Institute are to be recommended by the national societies and elected by the American Institute as a whole; so that membership in the American Institute is open to publicists of every American Republic and no publicist can be elected a regular member, in contradistinction to honorary membership, except upon the recommendation of the national society, unless the publicists of a particular republic should fail to organize a national society, in which case the members from this country will be elected by the American Institute itself.

It will be observed that the American jurists, to whom the Confidential Note of October 10, 1911, was sent, are requested to sign the Constitution, and that by so doing they become charter members of the American Institute. It is hoped that they will likewise approve the By-Laws, which are, as stated, almost identical with the By-Laws of the European Institute. By so doing, they will, in the opinion of the proposers, found the American Institute, providing it with a Constitution and a series of tried and serviceable By-Laws, which, however, may be revised in whole or in part at the first meeting of the American Institute.

The proposers cherish the hope that as soon as the charter-member, to whom this letter is addressed, shall sign the Constitution, that he will begin to organize a national society of international law in his home country, which shall be an associate branch or member of the American Institute of International Law, and from this national society the members shall be chosen. The proposers believe that the American Institute has a grand opportunity and that, composed as it will be of the leading publicists of Pan-America, it will render important services to international law; but, however great the success of the Institute may be, they nevertheless feel that the organization and the successful operation of the national societies of international law within each of the American Republics will render even a greater service by popularizing the principles of international law and bringing them to the knowledge of the enlightened and progressive citizens of each of the American Republics.

Thus, the American Institute will be the international representative of the American Republics. The national societies will be the national representatives, whose members possess the right to attend and to participate in every meeting of the American Institute. The matters discussed by the American Institute will not be decided by its members alone, but in co-operation with all of the members of the national societies who may care to attend, and, meeting in various countries, the American Institute will be brought into close touch with the national societies, so that it is in reality a national as well as an international Institute, and the property of each as well as of all the Republics.

Without further argument or statement, it is believed that the truly American principles of democracy and federation have guided and controlled the proposers in the organization of the American Institute of International Law.

If the Constitution and By-Laws are fortunate enough to meet with your approval, the proposers hope that you will sign one of the copies and return it to the undersigned at your earliest convenience; that you will not only express your willing-

ness to organize the national society, but take effective steps to bring it into existence, and that finally you will permit the proposers to name the temporary officers of the American Institute, who shall serve until the first regular session of the society, and shall take the necessary steps to complete the organization and to call the first session.

I would finally call your attention to the fact that the American Society of International Law is now issuing, beginning with the year 1912, a Spanish edition of the American Journal of International Law, and that copies thereof will be supplied at the rate of \$4.00 per annum to any society of international law, consisting of twenty-five members, organized in any of the American countries. The American Institute and the national societies will thus have a journal of international law, which will appear quarterly in the official language of the American Institute, namely, Spanish.

In the hope that you will sign the Constitution, thus becoming a founder of the American Institute of International Law; that you will approve its By-Laws; that you will authorize the proposers to constitute a temporary organization, and that you will yourself make every necessary effort to organize the national society of international law, I am, my dear Sir,

Your obedient servant,
JAMES BROWN SCOTT.

THE SPANISH EDITION OF THE AMERICAN JOURNAL OF INTERNATIONAL LAW

For a long time the publishers of the Journal have recognized the great advantage and desirability, if not the need, of a journal of International law which will do for Latin-America what the AMERICAN JOURNAL OF INTERNATIONAL LAW is doing for English-speaking America. The chances for the successful conduct of such a journal as an independent enterprise, without serious financial sacrifice on the part of the publishers, seemed remote; but the idea of issuing a Spanish edition of the AMERICAN JOURNAL OF INTERNATIONAL LAW has been frequently suggested and favorably considered by the officers of the Society as a means of filling the long-felt need in Latin-America. The JOURNAL already has quite a large circulation among Latin-Americans who read English, but it has about reached the limits of its circulation in that field and, if it is to extend the sphere of its usefulness within the greater bounds of Central and South America, which its success in English-speaking America seems to justify us to expect it capable of attaining, it must appear in the language common to the countries and peoples in and among which it is desired that the Journal be widely read.

The great cost involved in this plan seemed to make it also impossible of realization. But a fortunate circumstance happened in the latter part of last year which gave the Society the opportunity to carry out

its cherished plan. On December 14, 1911, the Board of Trustees of the Carnegie Endowment for International Peace, acting on the recommendation of the Director of the Division of International Law, presented through the Executive Committee, in pursuance of the purpose of the Endowment "to establish a better understanding of international rights and duties and a more perfect sense of justice among the inhabitants of civilized countries," appropriated a portion of the income of the Endowment to be applied by its Executive Committee to strengthen and increase the usefulness of journals of international law. The AMERICAN JOURNAL OF INTERNATIONAL LAW was fortunate enough to be included among those selected by the Executive Committee as the beneficiaries of this appropriation, and as the result of negotiations between the Executive Committee of the American Society of International Law, with the subsequent approval of its Executive Council, and the Executive Committee of the Carnegie Endowment for International Peace, it was decided that the best way to strengthen and increase the usefulness of the AMERICAN JOURNAL OF INTERNATIONAL LAW was to publish a Spanish edition of it and secure its wide-spread circulation throughout Latin-America. An arrangement of this kind was accordingly made, and beginning with the January, 1912, number of the JOURNAL, a Spanish edition has been printed and distributed throughout Mexico, Central and South America. The issue is being received with enthusiasm by Spanish readers interested in international affairs, and some of the Latin-American governments have subscribed for a number of copies for distribution among their officials.

The arrangement also includes a Spanish translation of the Proceedings of the Annual Meeting of the Society.

It has been provided that the members of the American Society of International Law shall have the right to elect which edition of the JOURNAL and Proceedings they shall receive. The terms to persons who may join the Society in order to receive the Spanish edition are the same as those already fixed, namely, five dollars dues per annum, with an additional charge of one dollar for foreign postage.

The Executive Committee of the Society was not content, however, merely to issue a Spanish edition of the JOURNAL and provide for its circulation among present and prospective Spanish-speaking members of the American Society of International Law. It thought that the most effective means of furthering its object, namely, "to foster the study of international law and promote the establishment of international rela-

tions on the basis of law and justice," would be to encourage the formation of societies of international law in the different countries of Latin-America. Accordingly, and in pursuance of the purpose expressed in the Society's constitution to co-operate with societies in other countries having the same objects, the Committee, as an inducement to the formation of such societies, provided that the price of subscription of the Spanish edition of the *AMERICAN JOURNAL OF INTERNATIONAL LAW*, including the Proceedings, to societies of international law in Latin-America having a membership of at least twenty-five members, shall be four dollars per annum, postage prepaid. It is gratifying to note that this wise forethought of the Committee has produced results, for the formation of societies of international law in Latin-America has already begun.

The American Society of International Law is to be congratulated upon this great opportunity to carry out a project which promises to play such an important part in promoting the friendly relations between the American Republics. For the first time, an organ has been established, printed in the languages common to the various countries of the Western Hemisphere, through the columns of which there may be an interchange of the views of the leaders of thought in the realms of international law and diplomatic relations from which there should result a clear and sympathetic understanding of the international problems which confront them.

FRENCH DIPLOMATIC AGENTS AND THEIR JURISDICTION AS CIVIL STATUS OFFICERS STATIONED ABROAD *

An extremely curious and interesting question regarding the juridical status of diplomatic agents in their capacity as civil status officers, was passed upon by the court for settling conflicts between French laws, in a decision of March 25, 1911. It is the case of *Rouzier v. Carteron*. Here is the controversy.

M. Rouzier, a French citizen residing at Port-au-Prince (Haïti), had, according to Haïtian laws, married a Miss Blanche de Madelung. In 1906, they obtained a decree of divorce from the Haïtian courts. In 1907, the former husband and wife wished to resume their former status

* Note kindly furnished by Mr. G. Scelle, of Paris, in reference to a recent decision by the court for settling conflicts between French laws.

and get married again; but the Haïtian law does not permit this. They then addressed themselves to M. Carteron, the French Minister to Haïti, in order that he should perform the marriage ceremony in his capacity of civil status officer for French citizens residing abroad. But a few days before the date appointed for the marriage, Rouzier contributed to a Haïtian newspaper an article regarding the re-marriage of former husband and wife, in which he criticized the Haïtian law. The article caused a stir, and the French Minister declared that, under these circumstances, he would not perform the marriage, stating that considerations of a diplomatic character incapacitated him.

M. Rouzier, who had traveled from France to Haïti to have the marriage performed, sought redress from the civil courts for the pecuniary and moral prejudice caused to him, suing the diplomatic agent for a sum of fifty thousand francs in damages.

Would the case be received by the courts or meet with a plea in bar arising from the theory of governmental acts? The French public law still admits this theory; the number of such cases tends to decrease, but they still occur particularly in matters concerning diplomatic acts. There are cases concerning claims of individuals for injuries sustained through acts of the agents of the state, upon which no court, administrative or judicial, can pass. Sometimes, jurisprudence still admits the "Act of state" doctrine when the interests of the French foreign relations are involved. The Civil Court of the Seine¹ has held, in fact, that it has no jurisdiction over the case. It states that the Civil Code (Art. 48) declared as legal all the acts of the Registrar General recorded by diplomatic and consular agents, but that such fact did not make civil status officers of these agents, that they remained administrative and diplomatic agents, and that their judgment and discretion should dictate their action in such matters. The French citizen abroad may benefit by their authority, but he has no legal right thereto.

Upon appeal of the case to the Paris Court, the Prefect of the Seine, in the name of the Ministry of Foreign Affairs, maintained the same opinion, stating that the refusal of Minister Carteron, dictated by purely diplomatic considerations, was a political act without remedy in law. But the Court of Appeal,² on the contrary, affirmed the competency of the judicial courts, and sent the case back to the Court of the Seine for regular adjudication. The Prefect of the Seine then raised

¹ Decision of May 13, 1909.

² Decision of December 27, 1910.

the point of conflict, and the case was submitted to the "Court for settling conflicts between French laws."

We may observe that it is abnormal to see conflict arise in this matter. The French court for settling conflicts between French laws owes its origin to the existence of two kinds of jurisdictions, the judicial and the administrative. The reason for its existence is the necessity of assigning jurisdictions in case of positive or negative conflict, that is to say, where two courts of different order believe that they are both competent or where both deny competency to each other. But it is not its function to dispossess the judicial authority of a case for the adjudication of which the latter holds itself competent, nor to invest it with a jurisdiction which in its judgment it does not possess. The court for settling conflict between French laws might, therefore, have annulled *deplano* the point of conflict raised by the Prefect of the Seine, without carefully examining the case. It did not do so; it examined the case; and we may possibly rejoice for its doing so, for it adjudicated the case in a way contrary to the opinion of the administration, by annulling the decree of conflict, basing its conclusion upon facts which weaken the arbitrary theory of the governmental act, and from the juridical point of view introduces some legality into the all too uncertain status of diplomatic agents.

The text of the decision is as follows:

The Court for settling conflicts between French laws, March 25, 1911—

In view of the fact that Rouzier, a French citizen, then residing at Port-au-Prince (Republic of Haiti) married on July 29, 1902, Blanche de Madelung, of German nationality, according to the laws of Haiti; that on Dec. 20, 1906, said marriage was dissolved by divorce; that in 1907, Rouzier and Blanche de Madelung desired to become reunited by marriage, and that because the laws of Haiti do not permit remarriage of former husband and wife, they addressed themselves to the French Minister in order that the latter might perform the marriage ceremony; that the marriage ceremony was to take place at an early date, when on September 26, 1907, upon the appearance in a Port-au-Prince newspaper of a letter written by Rouzier in regard to second marriages between divorced husbands and wives, Carteron, then French Minister to Haiti, notified Rouzier the following day that his marriage would not be performed at the legation; that in consequence of this refusal, Rouzier brought suit against Carteron before the Seine Civil Court for damages in the sum of 50,000 francs.

In view of the fact that in the case foreseen by Article 48 of the Civil Code, diplomatic agents act in the capacity of civil status officers; that, when as such they perform a marriage ceremony, the act which they perform is, therefore, essentially of a civil character, both in object and in form; that, in consequence, in case of failure to perform the act or otherwise, after promise to perform this act had been given, the

action in damages to which this failure may give rise is within the competency of the judicial authority; that this conclusion, for the same reasons, is true also, whenever they refuse to accept to act; that, as in the matter under consideration, it matters little, when the intervention of the diplomatic agent is not contrary to the clauses of some treaty and his offices are not forbidden by local legislation, if the refusal to act is based upon considerations of a diplomatic nature; and even admitting that in this case the agent might have incurred a responsibility, yet to appreciate this responsibility lies exclusively within the sphere of the judicial authority;

In view of the fact, therefore, that it was wrong, when after the decision of the Paris Court which declined to sustain his jurisdiction and attributed competency to the judicial authority in the suit instituted by Rouzier against Carteron, the Prefect of the Seine, raised the question of conflict of attributions;

Decides:

Art. 1. — The decree of conflict referred to above, rendered by the Prefect of the Seine, January 7, 1911, is hereby annulled.

From this decision there results, first, that diplomatic agents, when administering the service of civil status, must be considered as real diplomatic agents, and that their administration, like that of the civil status officers in France, or in the Colonies, comes under the control of the judiciary.

The control by the judiciary of the service of the civil status is foreseen by Articles 49-54 of the Civil Code. It is foreseen for, whoever be the agents charged with the service, not only for the mayors in France, but for captains and masters of merchantmen, for officers of war-vessels, maritime commissioners, and consular and diplomatic agents. This control is applicable no matter what be the motives invoked by the civil status agents in support of their acts.

The Minister of Foreign Affairs maintained in the matter under discussion that the functions of the diplomatic agents constitute a separate, distinct whole, that in whatever capacity and whenever they act, they perform political or governmental acts, and that under the direction of the Ministry of Foreign Affairs they must be the sole judges of the opportunity of their acts. Governmental control would, therefore, exclude any other control. The Minister added, moreover, that the consuls and diplomatic agents must respect the laws of the country to which they are accredited, under penalty of having their exequatur cancelled or of receiving their passport. Whatever the powers conferred upon them by their government, they can exercise these powers only with the condition that they receive the express or tacit consent thereto from the local sovereignty. And he finally added that it is even useful for the nationals that this should be so; for it is only by acting with dis-

cernment that the consuls and diplomatic agents may continue to exercise an authority which, having become embarrassing, would soon be withdrawn from them by the territorial sovereign.

This argument has been refuted decisively by M. Chardenet, the legal adviser of the government.

He said that it is not the quality of the officer which acts, nor the motives that he attributes to his act, which can modify the juridical nature thereof. The juridical character itself of a civil status act cannot be modified by external circumstances; it remains a civil status act, and he who performs the act, even though he belong to another branch of the government service, is a civil status officer in performing that act. As to considerations of a diplomatic nature, it is evident that they have been exaggerated. If between France and foreign nations treaties have been concluded which forbid consuls or diplomatic agents to perform civil status acts within their sphere of operation, our agents shall, of course, abstain from such acts, and their refusal cannot become the cause of judicial proceedings before the French courts, because, the treaty having modified the national law, the agents can no longer be civil status officers, and, therefore, they do not refuse to perform an act within their competence. In like manner, if the law of the country to which they are accredited forbids their performing these acts, we must then predicate that the French law, promulgated in the ignorance of that foreign law, was not intended to come into conflict therewith, nor to expose our consuls and diplomatic envoys to having their exequatur cancelled or of receiving their passport.³ But when neither treaties nor local laws forbid these acts, the diplomatic agents in the exercise of their civil status functions must be considered as real civil status officers and treated as such.

It is not, therefore, in the discretion of diplomatic agents to perform or to refuse to perform a civil status act when there is no legal obstacle in the way. All officers are compelled to exercise their authority. Discretionary authority is exceptional. The obligation of agents is, in particular, very strict in regard to civil status acts. Their authority is "liée" that is, definite and obligatory. A mayor may not, for any reason whatever, as for instance, for reasons of public order, refuse to perform a marriage. All he has to do in the premises is to look into the legal status of the future husband and wife. If this status is regular,

³ See, for like statement of view, Hall, *Foreign powers and jurisdiction of the British Crown*, 1894, § 41.

he must perform the marriage; but he may take such police measures as he deems proper, if, for instance, he should apprehend popular disorders. Why should a diplomatic or consular agent be permitted to do what a mayor may not? The agent's activity is just as essential; for without it the French nationals might find it impossible to perform certain acts which the French law says are proper. Of this, the present case is the best proof.

The Act of State doctrine can, therefore, not cover the acts and the conduct of diplomatic agents appointed to perform the functions of civil status officers. The Minister of Foreign Affairs declared that, if in this case *errors committed in the performance of the act* had been adduced, the Act of State doctrine could not have been invoked, but that as for the *refusal to perform the act*, the diplomatic agent had a right to invoke it. The attorney for the government has not admitted this distinction in the question of civil status acts, because the nature of the necessary act, whether performed or denied, cannot change, and because, as already observed, the authority to perform the act is definite and obligatory.

But it is certain that, in many diplomatic interventions, our jurisprudence still admits this theory and this distinction between the performance of the act and the refusal to perform it. Our jurisprudence admits it in questions concerning the protection which consular or diplomatic agents owe to our nationals abroad in matters of claims pressed against a foreign government for damages sustained by them;⁴ in orders notified to a Frenchman to leave the country where he resides;⁵ in decisions withdrawing from a foreign subject the benefit of French protection, for instance, in the Orient;⁶ and, in a general way, in questions concerning the interpretation of diplomatic conventions or in the administration of the relations of the French state with foreign states. The theory of the governmental act in these matters may, in cases of urgency, be defended, on the ground of the seriousness of questions that might arise therefrom, and also on the ground of the indefiniteness of certain diplomatic conventions. But, in our judgment, the power to invoke the Act of State doctrine should have as counterpart the obligation to indemnify the nationals who suffer thereby. In the question of

⁴ See, Decrees of the Council of State, Jan. 12, 1877, Dupuy; Dec. 23, 1904, Poujade.

⁵ See, Decrees of the Council of State, Dec. 8, 1882, Laffon.

⁶ See, Decrees of the Council of State, Feb. 12, 1904, Bachatari.

civil status acts, the same diplomatic motives could, anyhow, not be seriously invoked, and from the juridical point of view, it is inadmissible that civil status officers, no matter what their attributions in other respects, should claim the right to rid themselves of their professional obligations. The decision of the Court of Conflicts must, therefore, be approved in all points.

THE CERRUTI ARBITRATIONS ¹

For twenty-five years, from 1885 to 1911, the Cerruti case in its various phases was a thorn in the side of Colombia and Italy; diplomatic relations between the two countries were severed at times by reason of this case, and on at least two occasions Italian warships prowled in Colombian waters and forced compliance with Italian demands. The case itself was referred to the mediation of Spain, a mixed commission sat at Bogotá for its consideration, the President of the United States rendered an award in 1897, twelve years after the difficulty arose, but the case dragged on for a second period, this time some fourteen years, until it was finally settled, it is to be hoped, by the award of an arbitral commission at Rome on July 6, 1911.

The miserable affair is perhaps the best argument that could be made for a true permanent court composed of judges and permanently in session, for the questions were purely legal and could have been referred at the very beginning to an international court if one had existed in 1885, and the court could have rendered a decision in the course of a few months by the application of a few principles of law, thus saving Colombia from the humiliation of naval pressure and Italy from the greater humiliation of coercing a weaker state, for, in the language of John Bright, "force is no argument."

However, the purpose of the present comment is neither to commend nor to censure one party at the expense of the other, for neither seems wholly free from blame, but briefly to state the case with reference to the documents printed elsewhere in the JOURNAL, so that the reader can obtain a tolerably clear notion of the facts and principles involved and satisfy himself that the dispute was a proper one for a court of law. The

¹ See Bureau's *Conflit Italo-Colombien (Affaire Cerruti)*, 1899 (strongly Colombian); Darras' *Certains Dangers de l'arbitrage international* in the *Revue générale de droit International Public*, for 1899, pp. 533-552; Hagerup's *Affaire Cerruti — Sentence Arbitrale* de 6 Juillet 1911, *ibid*, 1912, pp. 268-274.

dispute is the familiar one of a foreigner settling in a Latin-American country, engaging in business, followed by the arrest of his person and the confiscation of his property for alleged complicity in a revolution. The home government espouses the cause of its subject; adequate reparation is refused; diplomatic relations are severed, good offices or mediation are tried until, finally, the case, which has thus assumed threatening proportions, is submitted to arbitration and decided or compromised many years after the event.

One Ernesto Cerruti, an Italian subject, emigrated to Colombia in 1869, settled in the State, now department, of Cauca, associated himself in business with men of local influence under the firm name of E. Cerruti & Company. In January, 1885, a revolution broke out in Cauca in which the Colombian associates of Cerruti were implicated, and in February the State of Cauca, accusing Cerruti of unneutral conduct, confiscated his personal property as well as the entire property of E. Cerruti & Company, not merely the interest which Cerruti may have had in the firm.

The questions involved in this action were questions of fact and of law. First, had Cerruti forfeited protection by taking part directly or indirectly in the revolution? Second, supposing that he was properly taxed with unneutral conduct, did his personal guilt, supposing it proved, authorize the State to confiscate the firm's property as a whole or only Cerruti's share in it? And, finally, was the firm, as a Colombian entity, subject to the law of its domicile, or was it a foreign person by reason of Cerruti's Italian nationality? These latter are, it would seem, purely legal questions, susceptible of determination by a court of justice.

Admitting that the confiscation of the firm's property in its entirety was illegal, the question at once arises whether Cerruti's rights as a member of the firm, admittedly Colombian, were to be determined by Colombian law, as would be the case with any purely domestic firm, or whether his foreign nationality permitted him as a matter of law to invoke the intervention of Italy before local remedies were exhausted, resulting in either a denial of justice or such a delay as might in the circumstances amount to a denial of justice? Colombia denied the right of diplomatic intervention; Italy claimed it, and the presence of an Italian warship complicated a situation sufficiently complicated. Diplomatic relations were severed; but, through the good offices of Spain, a protocol was concluded at Paris on May 24, 1886, by which Spain was asked and actually did perform the services of mediator.

Colombia agreed to restore to Cerruti, or his representative, the possession of the real property seized by the Colombian authorities, immediately upon the ratification of the convention. The following questions were submitted to the mediator: Has Cerruti or have the other Italian subjects forfeited their foreign neutral character? Have they lost the rights, prerogatives or privileges granted by the common law or the laws of Colombia? And, finally, should Colombia pay an indemnity to Cerruti and the other Italian subjects?² It was further provided that in case of a finding against Colombia, the dispute should be submitted to a mixed commission, composed of a Spanish, Italian and Colombian representative, who should meet at a specified time at Bogotá and decide the question finally and without appeal.

The mediator found against Colombia on January 26, 1888.³ The mixed commission met at Bogotá September 5, 1888, but adjourned March 23, 1889, without passing upon the question, as Cerruti refused to submit his case, alleging partiality of the commission, as well as other grounds. In 1892 Colombia invested its Supreme Court with jurisdiction to try and decide the case, but Cerruti failed to appear within the two years allowed for the proceedings. After further delay, Colombia and Italy agreed to the so-called protocol of Castellamare, signed August 18, 1894, to submit the case to the President of the United States as arbiter, investing him with full power, it would seem, to terminate the case once and for all. Mr. Cleveland, then President, accepted the invitation to arbitrate, and on March 2, 1897, two days before the end of his term, rendered an award.⁴

A great deal of stress has been laid on the fact that the award was handed down two days before Mr. Cleveland's retirement from office, a fact of little or no importance in itself, but pressed into service as showing or tending to show undue haste. The serious objection to the award is that it was made by a chief magistrate, instead of by a body of jurists, and that, as often happens in submissions to chief magistrates, whether kings or presidents, no reasons were given for the award. Had it been acceptable to the states in controversy, it would have settled

² See the text of the convention, SUPPLEMENT p. 238.

³ See JUDICIAL DECISIONS, this JOURNAL, p. 1003.

⁴ For text of this instrument see JUDICIAL DECISIONS, this JOURNAL, p. 1015. For a scathing criticism of the award, see Pierantoni's "Nullité d'un arbitrage international" in the *Revue de droit international et de législation comparée* for 1898, Vol. XXX, pp. 445 et seq.

the dispute, but as it was in favor of Italy and against Colombia, and as the reasons for the findings were a matter of conjecture, the award, instead of ending the dispute, seems to have rendered it more acute, if possible.

President Cleveland held that Cerruti's claims in his dual capacity as an individual and member of the firm of E. Cerruti and Company "are proper claims for international adjudication." This decision may have been proper, but the absence of reasoning deprives it of any great value as a precedent.

President Cleveland next rejected Cerruti's claims for "personal damages resulting from imprisonment, arrest, enforced separation from his family, and suffering and privations endured by himself and family" — a holding right or wrong according to the facts, circumstances and principles of law applied, none of which, however, are stated in the award. In like manner Cerruti's claim for expenses incurred in the present and past proceedings is disallowed, which may or may not have been proper.

The fourth holding follows in President Cleveland's language:

I award for losses and damages to the individual property of Signor Ernesto Cerruti in the State of Cauca, and to his interest in the copartnership of E. Cerruti and Company, of which he was a member, including interest, the net sum of sixty thousand pounds sterling, of which sum ten thousand having been already paid, the Government of the Republic of Colombia will, in addition, pay the Government of the Kingdom of Italy, for the use of Signor Ernesto Cerruti, ten thousand pounds sterling thereof within sixty days from the date hereof, and the remainder, being forty thousand pounds, within nine months from the date hereof, with interest from the date of this award at the rate of six per cent per annum, until paid, both payments to be made by draft, payable in London, England, with exchange from Bogotá at the time of payment.

Admitting that reasons for the decision were not necessary, this part of the decision settled the question, although a difference of opinion arose between Colombia and Italy regarding the manner of payment, which President McKinley was asked by both parties to pass upon but refused owing to the fact that the President was *functus officio* and could not "revive the personal character of arbitrator which his predecessor discharged by the rendition of his award."⁵

Colombia accepted the Cleveland award on the preceding points,

⁵ See the correspondence on this point in *Foreign Relations of the United States* (1898), pp. 251-273.

although it sought to make its acceptance conditional upon a modification of Article V, a revision of which it urged President McKinley to undertake upon a joint request from Colombia and Italy, in which request Italy refused to join. The attitude of the United States is set forth in the following passage in a note from Secretary Sherman:

The President of the United States, whether he be the individual who acted as arbitrator or his successor in office, became, under any circumstances, *functus officio*, so far as the arbitration was concerned, upon the rendition of his award, and could not undertake to reopen the arbitration and reconsider the award under any just view of the powers conferred upon him as arbitrator by the protocol under which he acted. Should the parties to the arbitration invite the reconsideration of the award in question, in whole or part, or request its interpretation in any respect, that could only be accomplished by a new submission and arbitration.⁶

Finally, President Cleveland held Cerruti to be "entitled to enjoy and be protected in the net sum awarded him hereby," and, to prevent future difficulties or misunderstandings, decided and adjudged to Colombia "all rights, legal and equitable, of the said Señor Ernesto Cerruti in and to all property, real, personal, and mixed, in the Department of Cauca, and which has been called into question in this proceeding." That is to say upon payment of £60,000 Colombia was to be subrogated to the rights of Cerruti in the Department of Cauca. In the next clause of the same paragraph of the award, Colombia was subrogated to the duties which might spring out of the rights assigned or conveyed in the preceding part of the award. Thus, "I further adjudge and decide that the Government of the Republic of Colombia shall guarantee and protect Signor Ernesto Cerruti against any and all liability on account of the debts of the said copartnership, and shall reimburse Signor Ernesto Cerruti to the extent that he may be compelled to pay such bona fide copartnership debts only established against any proper defences which could and ought to have been made, and such guaranty and reimbursement shall include all necessary expenses for properly contesting such partnership debts."

Against this part of the award, Colombia protested vigorously, alleging that it was "outside of the submission of the protocol," and for the further reason that it did not "determine and declare any amount of indemnity" which the claimant was entitled to receive from Colombia through diplomatic channels; that it was not a final disposition of the claim or claims; that it imposed an uncertain liability the amount of

⁶ Mr. Sherman to Señor Rengifo, For. Rel. of the U. S. 1898, p. 251.

which was not determined by the award; that it provided "a prolific source of disagreements growing out of the claims" which the award was to end, and that it was a delegation of the President's authority to persons or tribunals not "named in the protocol nor specifically provided for in the award" to determine the liability of Colombia.⁷

The refusal or delay of Colombia to accept and comply with the award in its entirety as demanded by Italy, was ended by the appearance of an Italian fleet in Colombian waters in the summer of 1898, and an ultimatum, dated July 22, 1898, from the commander of the fleet, that the indemnities awarded Cerruti be paid to the Italian Government according to its interpretation of the award, and that measures be taken by Colombia within three months, afterward extended on August 13th to nine months, to protect Cerruti against suits by his creditors.⁸

This ended the first episode in the Cerruti case, a controversy which could easily have been adjusted if referred to an international court, had one existed, or which could and should have been settled by a properly reasoned award in 1897.

Delay in the payment of some of the sums to which Cerruti was entitled under the award, the failure to settle with the creditors of the partnership in accordance with Article 5 of the award, to save Cerruti harmless from partnership claims and to reimburse him for expenses in contesting partnership claims, led to serious differences of opinion between Colombia and Italy, to adjust which the two countries agreed on October 28, 1909, to arbitrate all outstanding controversies arising out of the Cerruti case. Arbitration was had and the award was rendered July 6, 1911, which will end, it is hoped, a controversy which has embittered the foreign relations of Colombia and Italy.

It will be recalled that President Cleveland awarded the lump sum of 60,000 pounds sterling to Cerruti in full satisfaction of his claims against the Colombian Government, and directed Colombia to protect him from any claims against him as member of the firm of E. Cerruti & Co. It may well be that a difference of opinion might exist as to whether a particular item was in reality a partnership debt or a personal liability of Cerruti, for which the partnership firm was in nowise responsible, and, as a matter of fact, such differences of opinion did arise and various suits were brought to enjoin the Italian Government from paying Cer-

⁷ See Señor Rengifo's notes to Messrs. Olney and Sherman, dated respectively, Washington, March 3, May 1, 1897, in *For. Rel. of U. S.* (1898), pp. 246-249.

⁸ See correspondence in Bruneau's *Conflit Italo-Colombien*, pp. 115-125.

ruti the sums to which he was entitled under the Cleveland award, until the questions at issue between Cerruti and his creditors had been adjudicated. As Article 5 of President Cleveland's award subrogated the Colombian Government to the rights and obligations of the Cerruti partnership, the Colombian Government entered into negotiations with its creditors, in order to settle the claims for which they could produce proper proof. It offered the creditors the amount of their claims plus twenty per cent in addition, in order to cover interest and expenses. A single creditor, one G. Mazza, refused to accept in satisfaction of his claim the face value in Colombian money of the date of payment, increased by twenty per cent, and although the amount offered to Mazza was increased by forty per cent, he still refused, claiming that he should be paid in gold. The offer was dated February 8, 1899, and in September of the same year, after Mazza's refusal, the Colombian Government deposited the sum of 22907.22½ pesos with the British Minister at Bogotá, who, in the absence of an Italian minister, was acting for the Italian Government. Mazza was apparently as unwilling to compromise his rights as he was vigilant in enforcing them. Thus, in April, 1897, within a month after the Cleveland award, he brought suit to attach the 50,000 pounds sterling which the Italian Government received under the Cleveland award as trustee of Cerruti. After years of litigation, on March 24-April 1, 1902, the court of appeals of Perugia condemned Cerruti, both as partner and as personal debtor, to pay to Mazza the sum of 181,359.46 lire. Cerruti claimed that the Mazza indebtedness was a partnership, not a personal debt, and that therefore Colombia, not he, was responsible for it and the expenses incurred in defending the suit.

President Cleveland awarded, as has been stated, 60,000 pounds to Cerruti, including a sum of 10,000 pounds, which had been paid to Cerruti July 4, 1890. The sum of 10,000 pounds was to be paid sixty days from the date of the award, that is to say, on the first day of May, 1897, and to bear six per cent interest until paid. The balance, consisting of 40,000 pounds, was to be paid nine months from the date of judgment, that is to say, on December 2, 1897. Delays occurred in the payment of these sums and of interest upon them, which it is not material to note. Suffice it to say, as appears from the arbitral award of July 6, 1911, that in some instances Colombia recognized its obligation to pay interest, that in others it did not, and it maintained that Cerruti should be debited with interest on the sum of 10,000 pounds paid on July 4,

1890, which sum was included in the 60,000 pounds awarded by President Cleveland.

Again, Cerruti was, as has been mentioned, sued by various creditors for alleged partnership transactions or upon claims, for which it was alleged he was personally liable. In some instances the court took jurisdiction, maintaining that the sums held by the Italian Government as trustee were properly attachable; in others that they were not so attachable. It would appear that the indemnity could not properly be made liable for any claims arising out of the partnership transactions, for by President Cleveland's award Colombia was made responsible for the settlement of such claims, and the obligation was imposed upon Colombia by the Cleveland award to save Cerruti harmless and to reimburse him for expenses incurred in defending himself against claims of this nature. If claims against Cerruti had not arisen out of partnership debts or were not against him as a member of the firm, it might well be that the indemnity deposited with the Italian Government should be subject to attachment. This, however, would be a question of municipal law, of little or no interest to a foreign nation. As a consequence of this litigation, the Italian Government refused to hand over to Cerruti the money which it held in trust for him, until April 3, 1903, when it paid him the sum of 474,005 *lire* in gold, constituting the balance of the 50,000 pounds sterling then in the possession of Italy.

From this brief account it can be seen that President Cleveland's award, instead of settling the Cerruti claim, was but the beginning of a fertile source of contention. Thus, briefly to summarize, Cerruti maintained that Colombia was responsible for the Mazza claim, and that he should recover the amount of the judgment for which he had been declared judicially liable and which he paid as a matter of fact on April 3, 1903, the very day of the settlement with the Italian Government; second, that Colombia was indebted to him, Cerruti, in various sums, as interest on delayed payments of the indemnity to the Italian Government; and, third, that Colombia should reimburse him for the expenses to which he had been put in defending suits brought by creditors, to whom Colombia was, in his opinion, responsible. The Italian Government supported Cerruti's contentions, which, however, Colombia refused to accept. Finally, the two countries agreed to arbitrate the questions at issue, and on October 28, 1909, an agreement was concluded between Colombia and Italy submitting to arbitration the following questions:

1. What is the amount of the sum which the Government of Colombia has been obliged to pay and which it ought to pay by virtue of the claim of the late engineer, Gaspare Mazza, against Ernesto Cerruti & Co.

2. Among the delays that occurred in the payment to Ernesto Cerruti of the indemnity accorded to him by the Cleveland award, delays which the Government of Colombia admits in part, which should bear interest against the Republic and what is the amount of interest?

3. How much is due to the said Cerruti in conformity with and in execution of the last sentence of Article V of the arbitral award aforesaid and which in the English text is stated in the following terms: "Such guarantee and reimbursement shall include all necessary expenses for properly contesting such partnership debts"?

Pursuant to the agreement to arbitrate, the two governments appointed as arbiters Dr. Santiago Aldunate, Minister of Chile to Italy, and Professor Pasquale Grippio, Vice-President of the Italian Chamber of Deputies. The arbiters chose as umpire, in accordance with the powers conferred upon them by the agreement, Dr. Francis Hagerup, Minister Plenipotentiary of Norway. The commission thus composed met at Rome on April 24, 1911, determined its procedure, and directed that each party should deliver to the arbiters and to the opposite party memoirs, counter-memoirs and conclusions. This was done, the case was argued before the commission on June 28, 1911, and the unanimous judgment of the commission was rendered at Rome on July 6, 1911. The commission held that the Mazza claim was a claim against the partnership and that therefore Colombia should reimburse Cerruti for the amount of the judgment of the court of appeals of Perugia against him. In reaching this conclusion the commission not only carefully examined the circumstances attending the indebtedness, but printed in the award extracts from documents showing that the claim was in reality a partnership not a personal obligation. This holding was strengthened by the fact, already referred to, that on February 8, 1899, Colombia recognized the Mazza claim and offered to pay it, depositing for this purpose a certain sum of money with the British Minister at Bogotá, who represented Italy pending the rupture of diplomatic relations caused by the Cerruti case.

The commission allowed Cerruti simple, not compound, interest for the failure of Colombia to pay the various items of the indemnity of 50,000 pounds at the dates specified in President Cleveland's award. The commission did not allow any interest on the moneys from the date of payment to the Italian Government to April 3, 1903, when the balance of the indemnity was paid to Cerruti, for the very simple reason

that in the payment of the indemnity to Italy, Colombia had fulfilled its obligation and could not be taxed with responsibility for a delay on the part of Italy in transferring the money to Cerruti.

In deciding the third question, the commission found itself obliged to interpret President Cleveland's phrase concerning the guarantee and reimbursement of expenses. The arbiters held that "the Colombian Government, which in accordance with the said award assumed the responsibility of the entire indebtedness of the firm Ernesto Cerruti & Co., should reimburse all the expenses incurred in good faith by him, in order to establish in a definitive manner the extent of these obligations." Accepting this interpretation as correct, it would seem that Cerruti would only be entitled in strict law to reimbursement of the expenses incurred in defending the Mazza claim, as that was an obligation imposed upon Colombia by the Cleveland award. It would seem, in strict law, that Cerruti was not entitled under the Cleveland award to reimbursement of the sums expended by him in defending actions improperly brought against the fund or actions on claims which were not against the partnership as such or against him as a member of the partnership. The commission, however, found it difficult to distinguish between these various claims, and decided, no doubt wisely, to split the difference, by dividing between Colombia and Cerruti the expenses incurred in the various lawsuits, to which he had been a party.

The facts involved in this troublesome case are very complicated. It is believed, however, that if Mr. Cleveland had given reasons for his award, the controversy would have been decided in 1897 instead of perplexing the interested governments until the year 1911. The questions submitted were largely questions of fact, not questions of law. From the facts as stated in the award, it would appear that the commission decided properly the points of law involved. The Colombian Government was clearly not responsible for illegal attempts to attach the indemnity held in trust by Italy; yet it would be a hardship to compel Cerruti to bear all the expenses of the lawsuits improperly brought against the fund. Probably the commission felt that, inasmuch as Colombia was to blame in the first instance, it would only be equitable to require Colombia to pay at least a portion of these expenses. The commission was apparently authorized to compromise the case, because the award states specifically that it was authorized to decide as a court of equity. That the compromise was acceptable is apparent from the fact that the award is unanimous. It is to be hoped that the last word

has been said on the Cerruti case, which should have been, but was not, decided finally by President Cleveland in 1897.

FRÉDÉRIC PASSY

On July 22, 1908, Sir Randal Cremer, one of the founders of the Interparliamentary Union, died. On June 12, 1912, M. Frédéric Passy, Cremer's coadjutor in the founding of the Interparliamentary Union, passed away at Paris. They had both founded organizations in their respective countries for the peaceful settlement of international disputes; the *International Arbitration League* of the one, the *Société française pour l'arbitrage entre nations* of the other, exist. Their joint work, the Interparliamentary Union, with national groups in the various countries, international in fact as well as in theory, is firmly established and, wisely directed, is capable of rendering notable services to the world at large. They were both members of the parliaments of their respective countries, and they were both laureates of the Nobel Peace Prize, and their names are inseparably connected with national as well as international institutions, which they had the insight, the wisdom, and the honor to call into being. In another respect their careers were singularly alike, for a merciful Providence prolonged their years in order that they might see and enjoy the success of their labors.¹

Frédéric Passy was born at Paris on May 20, 1822, so that at the time of his death he had rounded out ninety years of a life devoted to the betterment of mankind. For many years he was chiefly interested in political economy, and brought to the peace movement the reputation of a sound and thoughtful economist. In 1867 he founded, with a group of friends, *La Ligue internationale et permante de la paix*, the title of which was afterward changed to *Société française des amis de la paix*, and which exists at present under the name of *La Société française pour l'arbitrage entre nations*. The Interparliamentary Union was due, as has been said, to the joint initiative of Sir Randal Cremer and M. Passy. It held its first meeting in 1888 at Paris, where it was definitely organized, and from 1889 it has regularly met. It was a singularly happy idea of the English workman and the French aristocrat and economist to organize a union composed of members of the different parliaments for the presence of a compact group of deputies, in every parliament, in

¹ For the career of Sir Randal Cremer, see the *AMERICAN JOURNAL OF INTERNATIONAL LAW* (1908), Vol. 2, pp. 858-862.

favor of the peaceful settlement of international disputes could and has exercised a powerful influence in debate, in shaping policy, and in securing the consideration, if not the actual acceptance, of peaceful settlement of international differences. Of its many services two may be mentioned: the so-called Permanent Court of Arbitration at The Hague is due in large measure to the project of the Interparliamentary Union of the year 1894, and the proposals for a general arbitration treaty, discussed so earnestly at the Second Hague Conference, were based upon the labors of the Interparliamentary Union.

With the growth of the Union and the increase of its membership, its influence has become more marked, and it is perhaps not too much to say that the Interparliamentary Union either is or can become the greatest single instrumentality for the preservation of peace between nations. Therefore, believers in the peaceful settlement of international disputes, whether by virtue of a general treaty of arbitration or by the decision of an international court of arbitration, owe a debt of gratitude to Sir Randal Cremer and Frédéric Passy, for they were leaders in a movement, whose ultimate success is certain, however remote it may unfortunately be.

THE PANAMA CANAL ACT

On August 24th last, another chapter in the long and eventful history of the attempt of man to overcome what up to a few years ago was regarded as an almost insuperable barrier of nature to the mingling of the waters of the Atlantic and Pacific between the two continents of the Western Hemisphere, was completed and added to the already numerous pages of the record of the interoceanic canal. On that day, President Taft affixed his signature in approval of the Act recently passed by the Congress of the United States "to provide for the opening, maintenance, protection and operation of the Panama Canal, and the sanitation and government of the Canal Zone."

No other legislative body has, it is believed, within many years, had before it for consideration questions so fraught with internal interest, so keenly and eagerly watched by powerful interested governments and of such vital importance to the commerce and future prosperity and development of the world, as are involved in the "opening, maintenance, protection and operation of the Panama Canal." When the Isthmus no longer separates the Caribbean Sea from the Bay of Panama, the distance by water from the Atlantic to the Pacific coasts of the United

States will be a little over one-third of the present distance, and the interchange of commodities between the Atlantic ports of North America and the western coast of South America and between the Atlantic ports of South America and the Pacific coast of North America, will be practically as easy and profitable as commercial intercourse between the Atlantic coast of North America and the Atlantic coast of South America, or between the Pacific coasts of the same continents, at the present time. The transportation routes between European ports and the Pacific coasts of North and South America will be considerably shortened and the route from Europe to the Orient may be somewhat affected; while trade between the eastern coasts of America and the Orient is sure to be encouraged. The effect upon the future development of the nations of the world of the opening of these new and great arteries of commerce, and the commingling of the peoples of the East and West and the North and South necessarily incident to travel upon these lanes, is a subject upon which our imagination may take the wildest flights and yet fall short of true prophecy. An inadequate comparison may be had by bearing in mind the present situation in Europe, Asia and Africa and endeavor to imagine the condition of those Continents had the Suez Canal not been opened.

That the framers of the Act knew and appreciated the difficulty and importance of their task is evidenced by the painstaking preparations they took to acquaint themselves with the subject before beginning the draft of the bill, as shown by the following extract from their report:

The Committee on Interstate and Foreign Commerce has labored unremittingly for a long time to work out the problems involved, and to present legislation adequate to meet the requirements of all conditions, existing or anticipated in connection with the maintenance, sanitation, and operation of the canal and the incidental civil administration. The important question of protection belongs to the jurisdiction of another committee. We have visited the Isthmus several times at the various stages of progress in constructing the canal. We have provided and reported necessary legislation at different times during the period of its construction. At various times we have had hearings concerning different phases of the subject. During the past three months we have heard expert witnesses in every line of life, and in every learned profession, and in every line of business, commerce, and navigation who in any wise could be interested in the construction and operation of the canal or were able by their information to throw light upon the questions involved. As a result we have acquired for the use of Congress and the public through those hearings several volumes of valuable if not exhaustive information covering the canal subject in all its phases, origin, stages, progress, and future. We trust that the results of our labors now laid before the Congress may prove of some value in assisting Congress to enact

adequate legislation for the successful operation of this great and glorious enterprise and the satisfactory government and administration of all its adjuncts and appurtenances.

And, again, by the attitude with which they approached the subject in actually planning the legislation, which may be seen from the opening paragraphs of the report:

The Panama Canal is unique in all respects, and at every stage presents novel problems. Its initiation involved intricate questions, requiring skillful diplomacy and tactful legislation. Its construction encountered untried difficulties and invented original methods and processes without the aid of model or previous suggestion. Likewise, legislation to operate and govern the gigantic institution, with its adjuncts and incidents, must, in the absence of precedent, rely upon basic principles, with analogy and reason as the only guide.

As there was no available route for the construction of the canal through our own territory, and under the terms of the Clayton-Bulwer treaty [we] were prevented from constructing a Government-owned canal at public expense for use of the Government, we were compelled, first, to secure a modification of the treaty, which authorized us, under stipulated conditions, to arrange with some Central American Government for the route and terms of constructing such a canal. Then Congress passed the canal act, pursuant to which the Canal Zone was acquired through a treaty establishing the mutual and reciprocal rights and obligations to obtain between the United States and the Republic of Panama, mentioning and adopting the essential features of our modified treaty with Great Britain.

The lengthy and earnest discussion of the bill in both the House and the Senate, and by members of Congress representing all sections and interests, and the manner in which the bill was gone over and amended word for word, provision by provision and section by section, leaves no ground for asserting or alleging that it is hasty or ill-considered legislation. The complete provisions of the bill may be seen from the Act itself, which is printed in full in the Supplement to this number of the JOURNAL, page 277.

The portion of the Act which is of particular interest from an international standpoint, and therefore of especial interest to the readers of the JOURNAL, is Section 5, relating to the question of tolls. The importance and complexity of this question as affected by the provisions of the treaties relating to the Canal are such that the JOURNAL will not now, when sufficient time has not elapsed even to read the lengthy debates and illuminating literature on the subject, attempt to comment upon or discuss the merits or soundness of the several contentions, leaving that subject for consideration in an article in an approaching number. Suffice it for the present to state that the bill, as reported to the House

of Representatives by the Committee on Interstate and Foreign Commerce, contained no exemption from the payment of tolls in favor of American commerce. In making this report, the Committee expressly and conclusively disavowed any intention to construe the treaty between the United States and Great Britain with reference to the toll question, by the following pointed language:

While many members of our committee believe that by the terms of our treaties with Great Britain we are prevented from allowing preferential or free tolls to ships of American registry, either coastwise or foreign, the majority of the committee voting for uniform tolls authorize and request the statement — positive, plain, and unequivocal — that no language of this section was chosen or used for the purpose of foreclosing discussion and differing opinions on that question. They authorize the express affirmation that this provision is adopted for present use, disclaiming all intention to declare in this section any construction of the language of the treaty or to establish any precedent or permanent legislative policy or to bind any future Congress should it be deemed expedient or adjudged competent to adopt a different basis. This statement of the committee may be clearly understood by reference to the original and committee prints of the bill, from which the committee adopting this section eliminated all reference to treaties. The language beginning on page 6 with the words "No preference shall be given," etc., which has been criticized as an attempt to construe the treaty and thereby estop us from future consideration of the question, was not quoted from the treaty at all, but was taken from bills introduced by advocates of free or preferential tolls. One containing the same language has been introduced by the leading champion and signer of the minority views. Not deeming it necessary at this time nor for this purpose to make a legislative declaration as to the construction of that part of the treaty, the majority of the committee recommend uniform tolls for reasons which they regard as good and sufficient.

The reasons given by the Committee were principally of a financial and economic nature. Vigorous opposition developed to this section of the bill, as an abandonment of the historic policy of the Government of the United States of free commercial intercourse between the states, and as being legislation favorable to the great transcontinental railroads. The objections along these lines may be summed up by the two following paragraphs, quoted from the report of the minority of the Committee on Interstate and Foreign commerce:

This bill, in so far as it provides for levying tolls upon vessels engaged in commerce between the States, is entirely new in American history. From the beginning of the Government to the present time, notwithstanding that we have appropriated \$627,098,236.05 for the improvement of rivers and harbors and the construction of canals, exclusive of the Panama Canal, it has never entered into the conception of Congress to erect a tollgate in the path of our domestic trade, for the benefit of which these improvements have been made.

The minority enters an emphatic protest against the abandonment in this bill of our historic policy of free commercial intercourse between the States. This great canal, built for the American people by American money, genius, and enterprise, should be forever a free and untrammelled competing route with transportation by land. We can not emphasize too strongly the elementary proposition that tolls levied upon vessels engaged in commerce between our eastern and western seaboard increase the amount the transcontinental railroads may charge for the same service. If a vessel en route from San Francisco to New York through the canal were required to pay \$10,000 in tolls, the transcontinental railroads would largely be the beneficiaries. This question affects every ton of domestic freight that passes through the canal and every ton that is carried across the country by the railroads.

A considerable portion of the report of the minority, in favor of preferential treatment for American coastwise ships, is devoted to the argument that such treatment is not a violation of the treaty, the opinions of President Taft, the Secretary of War, the Secretary of Commerce and Labor and the State Department being quoted in support of their contention. The argument may be summed up in the following paragraph:

It is manifest, from the reading of the treaty, that its purpose was to prevent discrimination against other nations. That free tolls to our coastwise vessels would not discriminate against the vessels of other countries becomes apparent when we reflect that under our navigation laws foreign vessels are prohibited from engaging in our coastwise trade. That being true, it is of no concern to foreign nations, their citizens or subjects, what treatment we accord to our coastwise trade.

The opponents of uniform tolls were successful, and the bill as finally passed, contained the provision specifically providing that "No tolls shall be levied upon vessels engaged in the coastwise trade of the United States."

Pending the consideration of the bill in Congress, the British Government, through its *Chargé d'Affaires* at Washington, lodged with the Secretary of State an informal protest against the proposal for inserting in the bill provisions for relieving American shipping from the payment of tolls. The substance of this protest was communicated by the Secretary of State to the Chairman of the Committee on Inter-oceanic Canals of the United States Senate on July 12, 1912. The letter of the Secretary of State follows:

Sir: I have the honor to bring to the knowledge of your committee the fact that a communication dated the 8th instant, just received from the British *chargé d'affaires*, indicates that the attention of the British Government having been called to various proposals from time to time made for the relieving of American shipping from the

payment of tolls on vessels passing through the Panama Canal, that Government has studied carefully those proposals and the arguments in support of them, with a view to the bearing thereon of the provisions of the treaty between the United States and Great Britain of November 18, 1901. The communication sums up the proposals mentioned as (1) one to exempt all American shipping from tolls, (2) one to refund to all American ships tolls which they might pay, (3) one to exempt from the payment of tolls American ships engaged in the coastwise trade, and (4) one to repay to the last-named class of American ships tolls which they might pay.

The communication indicates it to be the opinion of His Britannic Majesty's Government that to exempt all American shipping from the payment of tolls would involve an infraction of the treaty, and indicates further the opinion that there would be no difference in principle between charging tolls only thereafter to refund them and remitting such tolls altogether. The opinion is expressed that the method of charging but refunding tolls, while perhaps complying with the letter of the treaty, would still contravene its spirit. The communication admits that there is nothing in the Hay-Pauncefote treaty to prevent the United States from subsidizing its shipping, but claims that there is a great distinction between a general subsidy either to shipping at large or to shipping engaged in any given trade and a subsidy calculated particularly with reference to the amount of use of the canal by the subsidized lines or vessels. Such a subsidy, if granted, would not, in the opinion of His Britannic Majesty's Government, be in accordance with the obligations of the treaty.

With respect to the proposal that exemption shall be given to vessels engaged in the coastwise trade, the communication states that it may be that no objection could be taken if the trade should be so regulated as to make it certain that only bona fide coastwise traffic, which is reserved for American vessels, would be benefited by this exemption; but that it appears to His Britannic Majesty's Government that it would be impossible to frame regulations which would prevent the exemption from resulting in a preference to American shipping and consequently in an infraction of the treaty.

President Taft signed the bill over the British protest, giving his reasons therefor in a "Memorandum to accompany the Panama Canal Act," dated the White House, August 24, 1912. So much of the memorandum as relates to the toll question is quoted below.

MEMORANDUM TO ACCOMPANY THE PANAMA CANAL ACT

In signing the Panama Canal bill, I wish to leave this memorandum. The bill is admirably drawn for the purpose of securing the proper maintenance, operation, and control of the canal, and the government of the Canal Zone, and for the furnishing to all the patrons of the canal, through the Government, of the requisite docking facilities and the supply of coal and other shipping necessities. It is absolutely necessary to have the bill passed at this session in order that the capital of the world engaged in the preparation of ships to use the canal may know in advance the conditions under which the traffic is to be carried on through this waterway.

I wish to consider the objections to the bill in the order of their importance.

First. The bill is objected to because it is said to violate the Hay-Pauncefote Treaty in discriminating in favor of the coastwise trade of the United States by providing that no tolls shall be charged to vessels engaged in that trade passing through the canal. This is the subject of a protest by the British Government.

The British protest involves the right of the Congress of the United States to regulate its domestic and foreign commerce in such manner as to the Congress may seem wise, and specifically the protest challenges the right of the Congress to exempt American shipping from the payment of tolls for the use of the Panama Canal or to refund to such American ships the tolls which they may have paid, and this without regard to the trade in which such ships are employed, whether coastwise or foreign. The protest states "the proposal to exempt all American shipping from the payment of the tolls would, in the opinion of His Majesty's Government, involve an infraction of the treaty (Hay-Pauncefote), nor is there, in their opinion, any difference in principle between charging tolls only to refund them and remitting tolls altogether. The result is the same in either case and the adoption of the alternative method of refunding tolls in preference of remitting them, while perhaps complying with the letter of the treaty, would still controvert its spirit." The provision of the Hay-Pauncefote Treaty involved is contained in article 3, which provides:

The United States adopts, as the basis of the neutralization of such ship canal, the following rules, substantially as embodied in the convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal — that is to say:

1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

Then follow five other rules to be observed by other nations to make neutralization effective, the observance of which is the condition for the privilege of using the canal.

In view of the fact that the Panama Canal is being constructed by the United States wholly at its own cost, upon territory ceded to it by the Republic of Panama for that purpose, and that, unless it has restricted itself, the United States enjoys absolute rights of ownership and control, including the right to allow its own commerce the use of the canal upon such terms as it sees fit, the sole question is, Has the United States, in the language above quoted from the Hay-Pauncefote Treaty, deprived itself of the exercise of the right to pass its own commerce free or to remit tolls collected for the use of the Canal?

It will be observed that the rules specified in article 3 of the treaty were adopted by the United States for a specific purpose, namely, as the basis of the neutralization of the canal, and for no other purpose. The article is a declaration of policy by the United States that the canal shall be neutral; that the attitude of this Government toward the commerce of the world is that all nations will be treated alike and no discrimination made by the United States against any one of them observing the rules adopted by the United States. The right to the use of the canal and to equality of treatment in the use depends upon the observance of the conditions of the use by the nations to whom we extended that privilege. The privileges of all nations to

whom we extended the use upon the observance of these conditions were to be equal to that extended to any one of them which observed the conditions. In other words, it was a conditional favored-nation treatment, the measure of which, in the absence of express stipulation to that effect, is not what the country gives to its own nationals, but the treatment it extends to other nations.

Thus it is seen that the rules are but a basis of neutralization, intended to effect the neutrality which the United States was willing should be the character of the canal and not intended to limit or hamper the United States in the exercise of its sovereign power to deal with its own commerce, using its own canal in whatsoever manner it saw fit.

If there is no "difference in principle between the United States charging tolls to its own shipping only to refund them and remitting tolls altogether," as the British protest declares, then the irresistible conclusion is that the United States, although it owns, controls, and has paid for the canal, is restricted by treaty from aiding its own commerce in the way that all the other nations of the world may freely do. It would scarcely be claimed that the setting out in a treaty between the United States and Great Britain of certain rules adopted by the United States as the basis of the neutralization of the canal would bind any Government to do or refrain from doing anything other than the things required by the rules to insure the privilege of use and freedom from discrimination. Since the rules do not provide as a condition for the privilege of use upon equal terms with other nations that other nations desiring to build up a particular trade involving the use of the canal shall not either directly agree to pay the tolls or to refund to its ships the tolls collected for the use of the canal, it is evident that the treaty does not affect that inherent, sovereign right, unless, which is not likely, it be claimed that the promulgation by the United States of these rules insuring all nations against its discrimination, would authorize the United States to pass upon the action of other nations and require that no one of them should grant to its shipping larger subsidies or more liberal inducement for the use of the canal than were granted by others; in other words, that the United States has the power to equalize the practice of other nations in this regard.

If it is correct, then, to assume that there is nothing in the Hay-Pauncefote Treaty preventing Great Britain and the other nations from extending such favors as they may see fit to their shipping using the canal, and doing it in the way they see fit, and if it is also right to assume that there is nothing in the treaty that gives the United States any supervision over, or right to complain of, such action, then the British protest leads to the absurd conclusion that this Government in constructing the canal, maintaining the canal, and defending the canal, finds itself shorn of its right to deal with its own commerce in its own way, while all other nations using the canal in competition with American commerce enjoy that right and power unimpaired.

The British protest, therefore, is a proposal to read into the treaty a surrender by the United States of its right to regulate its own commerce in its own way and by its own methods — a right which neither Great Britain herself, nor any other nation that may use the canal, has surrendered or proposes to surrender. The surrender of this right is not claimed to be in terms. It is only to be inferred from the fact that the United States has conditionally granted to all the nations the use of the canal without discrimination by the United States between the grantees; but as the treaty leaves all nations desiring to use the canal with full right to deal with their own

vessels as they see fit, the United States would only be discriminating against itself if it were to recognize the soundness of the British contention.

The bill here in question does not positively do more than to discriminate in favor of the coastwise trade, and the British protest seems to recognize a distinction between such exemption and the exemption of American vessels engaged in foreign trade. In effect, of course, there is a substantial and practical difference. The American vessels in foreign trade come into competition with vessels of other nations in that same trade, while foreign vessels are forbidden to engage in the American coastwise trade. While the bill here in question seems to vest the President with discretion to discriminate in fixing tolls in favor of American ships and against foreign ships engaged in foreign trade, within the limitation of the range from 50 cents a ton to \$1.25 a net ton, there is nothing in the act to compel the President to make such a discrimination. It is not, therefore, necessary to discuss the policy of such discrimination until the question may arise in the exercise of the President's discretion.

The policy of exempting the coastwise trade from all tolls really involves the question of granting a Government subsidy for the purpose of encouraging that trade in competition with the trade of the transcontinental railroads. I approve this policy. It is in accord with the historical course of the Government in giving Government aid to the construction of the transcontinental roads. It is now merely giving Government aid to a means of transportation that competes with those transcontinental roads.

* * * * *

In a message sent to Congress after this bill had passed both Houses I ventured to suggest a possible amendment by which all persons, and especially all British subjects who felt aggrieved by the provisions of the bill on the ground that they are in violation of the Hay-Pauncefote Treaty, might try that question out in the Supreme Court of the United States. I think this would have satisfied those who oppose the view which Congress evidently entertains of the treaty and might avoid the necessity for either diplomatic negotiation or further decision by an arbitral tribunal. Congress, however, has not thought it wise to accept the suggestion, and therefore I must proceed in the view which I have expressed, and am convinced is the correct one, as to the proper construction of the treaty and the limitations which it imposes upon the United States. I do not find that the bill here in question violates those limitations.

On the whole, I believe the bill to be one of the most beneficial that has passed this or any other Congress, and I find no reason in the objections made to the bill which should lead me to delay, until another session of Congress, provisions that are imperatively needed now in order that due preparation by the world may be made for the opening of the canal.

WM. H. TAFT.

THE WHITE HOUSE, August 24, 1912.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Ann. Vie Int.*, Annuaire de la Vie Internationale, Brussels; *Arch. dipl.*, Archives diplomatiques, Paris; *B.*, boletin, bulletin, bolletino; *B. P. U.*, bulletin of the Pan-American Union, Washington; *Clunet*, J. de Dr. Int. Privé, Paris; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain; Parliamentary Papers, *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *L'Int. Sc.*, L'Internationalism Scientifique, The Hague; *Mém. dipl.*, Memorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil générale de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs G.*, Reichs-Gesetzblatt, Berlin; *Staats.*, Staatsblad, Groningen; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain: Treaty series.

January, 1912.

- 18 BELGIUM — PORTUGAL. Convention signed at Lisbon, regarding the establishment of telegraphic relations between Belgian Congo and Portuguese Angola. *Monit. B.*, July 19.

February, 1912.

- 12 BOLIVIA — GREAT BRITAIN. Agreement signed at La Paz for the exchange of postal money orders. *Treaty ser.*, No. 15, 1912.

March, 1912.

- 4 AUSTRIA HUNGARY — MONTENEGRO. Exchange of ratifications of treaty of commerce and navigation signed January 24, 1911.
- 30 FRANCE — MOROCCO. Treaty signed at Fez organizing French protectorate over the Moroccan Empire. *J. O.*, July 18. Text in *R. Politique et Parliamentaire*, 72:420.

April, 1912.

- 1 AUSTRIA — SPAIN. Royal decree establishing reciprocity in matters of intellectual property. *Ga. de Madrid*, April 3.

April, 1912.

- 3-8 HONDURAS — GREAT BRITAIN. Exchange of notes extending until April 6, 1913, the operation of the treaty of commerce and navigation signed January 21, 1887. *Treaty ser.*, No. 12, 1912.
- 4 BELGIUM — FRANCE. Exchange of ratifications at Brussels of (1) the declaration exchanged December 23, 1908, concerning the boundaries in the region of Shiloango; and (2) of the arrangement signed on the same date regarding the preferential right of France over the territories of the Congo Free State. *B. Usuel*, May 9.
- 4 BELGIUM — FRANCE. Exchange of ratifications at Brussels of declaration signed at Brussels, December 23, 1908, regarding the limits of their respective possessions in Stanley Pool. *B. Usuel*, May 9.
- 11 ARGENTINE — TURKEY. Exchange of ratifications at Berlin of consular protocol signed July 11, 1910, at Rome. *B. Oficial*, June 24.
- 14 FRANCE — RUSSIA. Convention signed at Paris for protection of literary and artistic works. *J. O.*, June 9.
- 17-22 INTERNATIONAL EXPOSITION OF AVICULTURE held at Lyon. *Daily Consular and Trade Reports*, 15:891.
- 22 AUSTRIA HUNGARY — BULGARIA. Treaty of commerce and shipping signed at Sofia.

May, 1912.

- 1 CANADA — FRANCE. Direct parcels post exchange goes into effect, including Algeria and Corsica. *Times*, May 1.
- 1 FRANCE — SPAIN. Convention signed at Paris, establishing recognition of national certificates of the gauging of merchant vessels. *Ga. de Madrid*, June 1.
- 3 ITALY — PERU. Award delivered by the Hague tribunal in the Canevaro case. *Times*, May 7; *this Journal*, 6:709-712. List of first eight decisions, *do*, 4:937-8; ninth case, *do*, 5:764. This is the tenth decision. *Oppenheim's International Law*, second edition, 1:521. Protocol of submission in *this Journal*, Supplement 6:212.
- 6 DENMARK — JAPAN. Ratifications exchanged at Tokyo of a special reciprocal customs convention signed at Copenhagen, February 12,

May, 1912.

- 1912; also of a treaty of commerce and navigation signed at the same time and place.
- 7-17 NINTH INTERNATIONAL RED CROSS CONFERENCE held in Washington. Program in *American Red Cross Bulletin*, April; Hill, "The American National Red Cross," *Century M.*, 84:136-141; Ruzé, "Organisation ou entente internationale de la croix-rouge," *R. générale de Dr. Int. Public*, 19:229-251.
- 9 COSTA-RICA — UNITED STATES. Ratifications exchanged at San José of a naturalization convention signed at San José, June 10, 1911. *U. S. Treaty ser.*, No. 570.
- 9 DENMARK — GREAT BRITAIN. Declaration signed at Copenhagen regarding the application of existing treaties of commerce to certain portions of the British dominions. *Treaty ser.*, No. 13, 1912.
- 10 FRANCE — NETHERLANDS. Ratifications exchanged at Paris of a convention signed at Paris, February 11, 1911, for the repatriation of indigent persons of unsound mind.
- 11 BELGIUM — FRANCE. Exchange of ratifications at Paris of the convention signed at Paris, March 12, 1912, for the delimitation of the France-Belgian frontier. *B. Usuel*, May 11; *Monit B.*, May 26.
- 15-17 EIGHTEENTH LAKE MOHONK CONFERENCE ON INTERNATIONAL ARBITRATION met at Lake Mohonk, New York. *This Journal*, 6:725.
- 16 BOLIVIA — ITALY. Exchange of notes at Rome ratifying a general treaty of arbitration signed at La Paz, May 11, 1911. *Ga. ufficiale* (Royal decree, No. 792).
- 22 INTERNATIONAL HORTICULTURAL EXHIBITION opened at London. *Times*, May 22.
- 27-June 1. EIGHTEENTH CONGRESS OF AMERICANISTS met at London. *Geog. J.*, 38:81; 39:81; *Am. Hist. R.*, 17:437.
- 27-31 FIRST INTERNATIONAL TECHNICAL CONGRESS FOR THE PREVENTION OF ACCIDENTS AND INJURY TO LABORERS AND FOR INDUSTRIAL HYGIENE was held at Milan. *Daily Consular and Trade Reports*, 15:493.

June, 1912.

- 3 INTERNATIONAL FIRE AND SALVAGE EXHIBITION opened at St. Petersburg. *Daily Consular and Trade Reports*, 15:425.

June, 1912.

- 4 INTERNATIONAL RADIOTELEGRAPHIC CONFERENCE opened at London. *Times*, July 8, 13; *Nation*, 95:86.
- 4-7 SIXTEENTH CONGRESS OF THE INTERNATIONAL ASSOCIATION FOR THE PROTECTION OF INDUSTRIAL PROPERTY met in London. *Daily Consular and Trade Reports*, 15:455-6.
- 6 PANAMA — UNITED STATES. Convention signed at Washington providing a parcels-post arrangement. *American R. of Rs.*, 46:33.
- 11-12 INTERNATIONAL CONGRESS OF EDITORS met at Berne. *Dr. d'auteur*, 25:132.
- 15 SECOND INTERNATIONAL CONFERENCE FOR UNIFICATION OF THE LAW OF THE CHECK opened at The Hague. *Mém. dipl.*, 50:389.
- 15 FRANCE — GERMANY. The commission for the delimitation of the Congo-Cameroons frontier met at Berne. See November 4, 1911. *Times*, May 29. See July 18, *infra*.
- 15-18 INTERNATIONAL CONGRESS OF ARTISTS met at Paris. *Dr. d'auteur*, 25:108.
- 17 INTERNATIONAL HORSE SHOW opened at London. *Times*, May 8.
- 19 FRANCE — SWITZERLAND. Exchange of notes renewing for five years from July 14, 1912, the arbitration convention signed December 14, 1904. *J. O.*, June 21.
- 26-27 INTERNATIONAL REGATTA held at Kiel. *Times*, June 14.
- 27 ITALY — JAPAN. Royal decree (No. 708) issued converting into a law the provisional agreement regarding commerce, customs and navigation as contained in notes exchanged in Rome, July 12, 1911.

July, 1912.

- 2 THE IMPERIAL UNIVERSITIES CONGRESS opened at London. *Science*, 36:77.
- 5 BOLIVIA — GREAT BRITAIN. Ratifications exchanged at London of treaty of commerce signed at La Paz. August 1, 1911. *Treaty ser.*, No. 17, 1912.
- 6 FRANCE — GREAT BRITAIN. Protocol respecting the application of the additional articles of the commercial convention of 1826 to certain parts of His Britannic Majesty's Dominions, signed at Paris. *Treaty ser.*, No. 18, 1912.

July, 1912.

- 6 OLYMPIC GAMES opened at Stockholm. The previous Olympiads were held at Athens, in 1896, Paris in 1900, St. Louis, 1904 and London, 1908. *American R. of Rs.*, 46:15.
- 8 INTERNATIONAL CONFERENCE ON THE TRANSPORTATION OF EXPLOSIVES met at Berne. *Mém. dipl.*, 50:434.
- 8 TWENTY-THIRD INTERNATIONAL CONGRESS OF MINERS met at Amsterdam. *Mém. dipl.*, 50:437; *Times*, July 9, 17.
- 10 HONDURAS — UNITED STATES. Ratifications exchanged at Washington of an extradition convention signed at Washington, January 15, 1909. *U. S. Treaty ser.*, No. 569.
- 13 PERU. The Casement report issued on conditions in the Putamayo. *Times*, July 15, 16; *Cd.* 6266.
- 18 FRANCE — GERMANY. Berne Commission (see June 15, above) agree on a protocol. *Q. dipl.*, 16:174.
- 20 GREAT BRITAIN — UNITED STATES. Agreement signed adopting rules and method of procedure for the settlement of questions regarding the exercise of fishing liberties referred to in Article 1 of the treaty of October 20, 1818. *Congressional Record*, August 1, 1912.
- 24 FIRST INTERNATIONAL EUGENICS CONGRESS met in London. *Times*, July 25; *Nation*, 95:75; Tredgold, *The Study of Eugenics*, *Quart. R.*, 217:43-67.
- 28 INTERNATIONAL CONGRESS FOR THE INTERCHANGE OF STUDENTS met in London. *Science*, 36:142.
- 29 INTERNATIONAL COLONIAL INSTITUTE opened at Brussels. *Times*, July 30.
- 30 JAPAN. Death of Emperor Mutsuhito. *Times*, July 30. (12:43 a. m., Tokyo time.)

ADHESIONS.

- Circulation of Automobiles, Paris, October 11, 1909.
- Montenegro, *J. O.*, June 21.
- Portugal, *B. Usuel*, April 5.
- Convention of Berne, revised, November 13, 1908.
- Denmark, *J. O.*, July 28.
- Great Britain, *Dr. d'Auteur*, 25:105.
- Central American Convention, January, 1910.
- Guatemala ratified all seven. *El Guatemalteco*, June 1.

Franco-German Convention, November 4, 1911, Morocco.

Belgium adhered. *B. Usuel*, May 20.

The Hague Conventions, 1907.

Cuba, I, IV, V, VI, IX, X.

Conventions of Fourth International American Conference.

Guatemala: Literary and artistic property; pecuniary claims:
patents; trade-marks.

Dominican Republic; first and second. *B. Rel. Ext.*, June, 1912.

International Radiotelegraph Convention, Berlin, November 3,
1906.

Siam, *J. O.*, June 15.

Italy, *J. O.*, June 15.

San Marino, *J. O.*, June 15.

Greece, *J. O.*, July 17.

Morocco, *Monit. B.*, April 12.

OTIS G. STANTON.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

GREAT BRITAIN ¹

Bolivia, Agreement between United Kingdom and, for exchange of postal money orders; signed at La Paz, February 12, 1912. (Treaty Series, 1912, No. 15.) 3d.

China, Correspondence respecting the affairs of. [October to December, 1911.] (Cd. 6148.) 1s. 4d.

Congo, Correspondence respecting the administration and finances of the. [January to April, 1912.] With map. (Cd. 6145.) 6d.

Denmark, Declaration between United Kingdom and, respecting the application of existing treaties of commerce to certain parts of His Britannic Majesty's Dominions; signed at Copenhagen, May 9, 1912. (Treaty series, 1912, No. 13.) 1d.

Egypt. Reports by H. M. Agent and Consul-General on the finances, administration and condition of Egypt and the Soudan in 1911. (Cd. 6149.) 9½d.

Germany. Translation of the Naval Law Amendment Bill. (Cd. 6117.) 1½d.

Honduras, Exchange of notes between United Kingdom and, extending until April 6, 1913, the operation of the treaty of commerce and navigation between the two countries of January 21, 1887; April 3-8, 1912. (Treaty series, 1912, No. 12.) 1d.

Pecuniary claims, Agreement between United Kingdom and United States for settlement of certain; signed at Washington August 18, 1910. (Treaty series, 1912, No. 11.) 1½d.

Portugal, Agreement between the United Kingdom and, respecting the boundary between British and Portuguese possessions on the Ruo and Shire Rivers; Lisbon, November 6-30, 1911. With map. (Treaty series, 1912, No. 10.) 5½d.

Seal fisheries, North Pacific. H. L. Bill, No. 69, Session 1912, to make such provisions with respect to the prohibition of catching seals

¹ Official publications of Great Britain and many of the British colonies may be purchased of Wyman & Sons, Ltd., Fetter Lane, E. C., London, England.

and sea otters in certain parts of the Pacific Ocean, and for the enforcement of such prohibitions as are necessary to carry out a convention between H. M. the King and the United States of America, The Emperor of Japan, and the Emperor of All the Russias. 1d.

Treaties, etc., between the United Kingdom and foreign states. Accessions, Withdrawals, etc. (Treaty series, 1912, No. 14.) 1½d.

UNITED STATES ²

Alien and sedition laws, 1798. Debates in House of Delegates of Virginia in December, 1798, on resolutions before House on acts of Congress called alien and sedition laws. July 6, 1912. 187 p. (S. doc. 873.) Paper, 15c. *Senate*.

Arbitration. Article published in *North American Review* entitled "Senate amendments to arbitration treaties," by Augustus O. Bacon. May 8, 1912, 10 p. (S. doc. 654.) Paper, 5c. *Senate*.

Chinese, Treaty, laws, and regulations governing admission of; regulations approved April 18, 1910. Edition of April 15, 1912. 63 p. *Immigration and Naturalization Bureau*. Paper, 5c.

Citizenship of Porto Ricans. Hearing on H. 20048 declaring that all citizens of Porto Rico and certain natives permanently residing in said island shall be citizens of the United States. May 7, 1912. 43 p. *Pacific Islands and Porto Rico Committee*.

Expatriation of citizens, Hearings on H. 21358 to repeal Sec. 3 of act in reference to (marriage of American women to foreigners.) 1912. 26 p. *Foreign Affairs Committee*.

Extradition convention between United States and Honduras; signed Washington, January 15, 1909; proclaimed July 10, 1912. 12 p. (Treaty series, No. 569.) [English and Spanish.] *State Dept.*

Foreign service, Report favoring H. 20044 for improvement of. June 5, 1912. 97 p. (H. rp. 840.) *Foreign Affairs Committee*.

French spoliation claims, Review of history of, and some principles of international law applying to them. 1912. 35 p. *Claims Committee*.

Ghent, Treaty of. Hearing on S. 4256 to approve celebration of 100th anniversary of Treaty of Ghent. April 24, 1912. 19 p. *Foreign Relations Committee*.

² When prices are given, the document in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Immigration, Hearings on S. 3175 to regulate. May 4-8, 1912. pt. 8, 224 p. *Immigration and Naturalization Committee.*

Immigration legislation: 1. Federal immigration legislation; 2. Digest of immigration decisions; 3. Steerage legislation, 1819-1908; 4. State immigration and alien laws. December 5, 1910. [Published] 1911. 956 p. il. (S. doc. 758, 61st Cong. 3d sess. Vol. 39, Reports of Immigration Commission.) Paper, 65c. *Immigration Commission.*

International Commission of Jurists. Convention between United States and other Powers establishing; signed Rio de Janeiro, August 23, 1906, proclaimed, May 1, 1912, 9 p. (Treaty series, No. 565.) [Portuguese, Spanish and English.] *State Dept.*

Magdalena Bay. Response to resolution, correspondence relative to American syndicate interested in lands in. May 23, 1912. 6 p. (S. doc. 694.) *State Dept.*

———. Report relating to purchase of land at Magdalena Bay by Japanese Government or by Japanese company. May 1, 1912. 3 p. (S. doc. 640.) *State Dept.*

Naturalization convention between United States and Nicaragua; signed Managua, December 7, 1908; proclaimed, May 10, 1912. 6 p. (Treaty series, No. 566.) [English and Spanish.] *State Dept.*

———. Supplementary convention; signed Managua, June 17, 1911, proclaimed May 10, 1912. 4 p. (Treaty series, No. 567.) [English and Spanish.] *State Dept.*

North Atlantic Coast Fisheries: Proceedings in arbitration before Permanent Court of Arbitration at The Hague. 1912. Vols. 9-11. (S. doc. 870, 61st Cong. 3d sess.) Paper, Vol. 9, 65c; Vol. 10, 50c; Vol. 11, 45c.

Opium. Communication covering report of American delegation to International Opium Conference held at The Hague, December 1, 1911-January 23, 1912. May 31, 1912. 41 p. (S. doc. 733.) Paper, 5c. *State Dept.*

Panama Canal. Hearings on H. 21969 for opening, maintenance, protection and operation of Panama Canal, and sanitation and government of Canal Zone. 1912. pts. 6-8, vi, 165-599 p. map. *Interoceanic Canals Committee.*

Panama Canal. Hearings on H. 21969 for opening, maintenance, protection and operation of Panama Canal, and sanitation and government of Canal Zone. 1912. 928 p. 2 maps. *Interoceanic Canals Committee.*

. Panama Canal. Hearings relating to investigations made as to progress of canal and to determine what requirements are on Canal Zone in order that proper legislation may be enacted. April 4, 1912. 1127 p. il. 2 pl. (H. doc. 680.) Paper, 80c. *Interstate and Foreign Commerce Committee.*

Philippine Islands, Report favoring H. J. R. 278 to secure neutralization of, and recognition of their independence by international agreement. May 1, 1912. 3 p. (H. rp. 635, pt. 1.) Paper, 5c. *Insular Affairs Committee.*

———. Views of minority adverse to. May 1, 1912. 6 p. (H. rp. 635, pt. 2.) Paper, 5c. *Insular Affairs Committee.*

Territorial integrity of nations, Report amending H. J. R. 100, authorizing President to give instructions to delegates of United States to next Hague Conference and to next Pan-American Conference. May 15, 1912. 9 p. *Foreign Affairs Committee.* (H. rp. 705.)

War claims, Compilation of laws and decisions of courts relating to. 1912. 333 p. *War Claims Committee.*

Wireless telegraphy. Convention between United States and other Powers; signed, Berlin, November 3, 1906, proclaimed May 25, 1912. 58 p. il. (Treaty series, No. 568.) [French and English.] *State Dept.*

GEORGE A. FINCH.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

SWITZERLAND V. FRANCE

*Award concerning the interpretation of a regulation of the commercial
convention and report signed at Berne, October 20, 1906*

Rendered at Paris, August 3, 1912

I

By an exchange of notes of November 18, 1910, and July 13, 1911, France and Switzerland have agreed, in conformity with Article 24 of the commercial convention entered into between them October 20, 1906, and of Annex E of that convention, to submit to the final decision of an arbitral tribunal the difference which has arisen between the two states in regard to the scope and interpretation of a note inserted into the report, signed at Berne October 20, 1906, as well as the commercial convention. By this report, "it has been agreed upon that * * * the General Direction of French Customs would enforce, during the period for which this same convention is to run, the regulations specified in the document annexed under No. 2." Among these regulations, we find the following one: "No. 510. This number includes *steam turbines*."

II

Switzerland maintains that under the tariff regulations in force in France at the time of the negotiations and of the taking effect of the commercial convention of October 20, 1906, steam turbines were already included administratively in the stationary steam engines of No. 510 of the French tariff;

That Switzerland asked and obtained, by the insertion of the Regulation bringing the turbines under No. 510, a conventional and international stipulation for this inclusion "for all the duration of the convention"; that, in consequence, France had no longer the power to modify at her convenience the customs tariff upon steam turbines and must maintain their inclusion in the stationary steam engines;

That France, nevertheless, at the time of revising her customs regulations by the law of March 29, 1910, which went into effect two days later, April 1, not only exercised her right to modify and increase the tariff rates on stationary steam engines, but created, in No. 510, a special class entitled "steam engines without piston," a class upon which was imposed an additional tax of 50 per cent of the duties applicable to the other stationary steam engines with piston;

That all the preparation in the French Chamber and Senate of the revised tariff of March 29, 1910, implies the intention of imposing this increase upon steam turbines and upon no other engines;

That, in fact, by adopting the expression "steam engines without piston," it was intended to designate steam turbines under another name;

That, practically and commercially, there are no other steam engines without piston, except the turbines;

That all the engines indicated on the part of France as without piston, are on the contrary, provided with that feature, in conformity with the descriptions deposited by the inventors themselves in their applications for patent in France;

That, although it is true France refused to consolidate the tariff upon stationary steam engines and Switzerland was not able to obtain that consolidation in Tariff B annexed to the convention of October 20, 1906, France, nevertheless lost her tariff right in the measure of engagements contracted by her with Switzerland, that is to say, within the limits of the note providing for the inclusion of turbines in No. 510, which assures to Switzerland the tariff treatment of stationary engines, which note excludes the power to tax steam turbines as such and to impose upon them, under the name of engines without piston, duties which are higher than the duties imposed upon other stationary engines;

That the "administrative regulation" was agreed upon for the purpose of transforming into conventional form the administrative assimilation already existing of steam turbines to stationary engines in so far as tariff treatment was concerned;

That if this stipulation had not that meaning, it would have no practical bearing, so that no explanation could be made why it had been requested by Switzerland and refused by France for such a long time in the course of the negotiations of 1905-1906;

That the French Government itself, during the period which elapsed between the adoption by the Chamber of Deputies of increased duties particularly affecting steam turbines and the adoption of the text of

the present tariff of 1910 by the Senate, has upon the representations made by the Federal Government, asked the Senate to remove these differential duties, as shown by the parliamentary documents of the Senate—thus implicitly recognizing the true scope of the “administrative regulation.”

Switzerland, in consequence, asks that for the entire duration of the convention, steam turbines constructed in Switzerland be admitted into France on the same conditions of tariff treatment as stationary steam engines with piston, and that they be not subject to additional duties nor to any other onerous differential treatment.

Moreover, Switzerland demands the refunding of the duties which, in its judgment, were unduly levied upon steam turbines of Swiss construction since April 1, 1910, and demands also that, in view of the great length of the negotiations which preceded the meeting of the arbitral tribunal as well as of the procedure beginning with the organization of the tribunal, an equitable indemnity be allowed her to be apportioned among her constructors of steam turbines, the exportation of which to France has been paralyzed since April 1, 1910, whose business has at the same time been damaged because of the securing of the trade of their customers by competitors.

III

France makes answer to the effect that her entire policy for the last twenty years has been based upon the principle that she must preserve her control over her customs tariff, which, while it must remain subject to constant unilateral modification, is composed of two schedules, one of which, the general tariff, is applicable to the products of the states to which France does not intend to grant any commercial favor, while the other, the minimum tariff, representing the minimum protection thought to be necessary for French industries, is granted in whole or in part to certain states and can be modified only by law;

That in the course of the negotiations and in spite of the repeated behests of Switzerland, the French Government has constantly refused to consolidate the customs duties upon stationary steam engines, duties which appear under No. 510 of that tariff;

That, if France accepted the administrative note of October 20, 1906, including the steam turbines in that number for the collection of the customs duty, she meant, nevertheless, to reserve her entire freedom upon tariff decisions and upon revising and classifying the article;

That, in refusing to restrict in any manner whatever the liberty of her tariff upon engines, France reserved the right to make such modifications as might seem best to her: that she could freely, in No. 510, make changes in the tariff rates, of the scale of the weights of engines, creating classes of engines by subjecting them to different rates, and that it was all the more natural to raise the duty pertaining to turbines because the latter cost two or three times more to the kilogram weight than the engines with piston and could not equitably continue to be subject to the same tariff duties;

That the minimum tariff can be modified only by the law, that is to say, by the aid of Parliament;

That the inclusion, by an administrative note, of steam turbines in No. 510 of the tariff, that is to say, in a number which France could modify at her will, is necessarily of secondary importance and can have no more effect than the legislative text of the convention itself; administrative regulations are simply customs practices, nothing more;

That the new French tariff which went into effect April 1, 1910, has respected the customs assimilation granted to Switzerland by the administrative regulation, since steam turbines, which appeared under a No. 510 bis with a special duty in the text adopted in the beginning of the work of revising the tariff by the Chamber of Deputies, have been arranged in the definitive text under No. 510 in which there now appear two great categories of stationary engines, the engines with and without piston; that in the convention with Switzerland nothing was opposed to the adoption of a distinction of this nature; that turbines are stationary steam engines without piston; that there are others, few in number, it is true, but that it was prudent to bear in mind, when making the customs tariff, the efforts which are daily made in this kind of construction and to take forthwith the necessary precautions to safeguard the national production;

That the confirmation, in an administrative regulation resulting from a commercial convention, of a tariff assimilation could not result in the consolidation of duties appertaining to merchandise which is the object of this assimilation, for such an engagement can have no other significance than the maintenance of the article in the designated category. If it were otherwise, it would be sufficient to proceed by way of an administrative regulation, not subject to the control of Parliament, to bind the future in so far as tariff matters are concerned. French legislation is firmly opposed to this procedure;

That it is not right to say that the French Government, by being opposed to the insertion of steam turbines under a No. 510 bis, has thereby renounced the right to accept a new signification of the No. 510 itself, and that, moreover, it has presented no observations at the time of the vote on the No. 510 in Parliament;

That if the Swiss Government had wished to obtain for turbines the same advantages as those accorded to stationary steam engines with piston, it should have requested that a note confirming this assimilation appear in Table B of the convention of October 20, 1910, as is done for a number of engines and other objects in the French customs tariff;

France, in consequence, demands that steam turbines of Swiss construction be subject to the customs treatment of No. 510 of the tariff of March 29, 1910, the administrative note finding in this way the only application of which it is reasonably susceptible. She demands, moreover, subsidiarily, the rejection of the Swiss demand which seeks to obtain the refunding of duties collected upon the basis of the tariff of 1910 and an indemnity in behalf of Helvetic manufacturers of steam turbines, this request not being accompanied by any detailed figures, and the decrease of steam turbine shipments into France being due less to the new tariff, than to the establishment in France of branches of Swiss manufactures, by the sale of licenses by the inventors to French manufacturers, and, finally, to the development of gas and crude oil motors which assure greater profits. An indemnity for vaguely stated indirect damages is inadmissible.

IV

In conformity with Annex E of the commercial convention of October 20, 1906, Switzerland designated as its arbitrator, Mr. Eugene Borel, Doctor of Laws, Professor in the University of Geneva, and France, Mr. Plichon, engineer, member of the Chamber of Deputies, replaced in December, 1911, by Mr. Noël, Senator, Director of the Central School of Arts and Manufactures, and the two parties designated as umpire, Lord Reay, member and former president of the British Academy, member and former president of the Institute of International Law, Associate of the French Academy of Moral and Political Sciences, former Governor of Bombay. Mr. Jarousse de Sillac, permanent secretary of the commission of the Hague Conferences, performed the duties of secretary of the tribunal. Mr. Leroy, attaché to the Ministry of Foreign Affairs, took the latter's place during the session of January 18, 1912.

The parties waived the established custom of being represented before the tribunal by agents.

In conformity with the procedure determined upon by the tribunal during its first session, held in Paris, in the Ministry of Foreign Affairs, January 18, 1912, the Memoir, Answer, Rebuttal and Sur-Rebuttal of the two parties were presented within the periods specified, except in relation to the Answer, the presentation of which was delayed in consequence of unforeseen circumstances. After deliberation by the arbitrators during the second session held in Paris, August 2, the following decision was rendered by the tribunal during the third session, August 3.

V

Considering that the report, signed by the plenipotentiaries of the two contracting parties, October 20, 1906, states that the regulations specified in the documents annexed under No. 1 and under No. 2 shall be applied through administrative channels during the life of the convention of October 20, 1906;

The arbitral tribunal believes that these regulations, agreed upon in the negotiation of the said convention, are an integral part thereof and that the contracting parties are obligated to observe the tariff regime which these regulations have established;

The tribunal, in consequence, can attribute to these regulations no other character except that of stipulations incorporated in the convention itself.

Considering that the treaty of commerce and the regulations are international conventions governed by the sanction which the contracting parties, represented by their plenipotentiaries, have given thereto;

The tribunal is not called upon to consider whether or not the regulations must be submitted to the sanction of the legislature; that is a matter pertaining to internal law.

Considering that, in accordance with the generally admitted principles for the interpretation of contracts, "a clause must be interpreted in the meaning according to which it may accomplish some effect rather than in the meaning in accordance with which it might produce no effect whatever;" (French Civil Code, Art. 1157.)

Considering that the administrative note prescribing that, for the whole life of the Franco-Swiss commercial convention of October 20, 1906, steam turbines shall be included in No. 510 of the French customs tariff, would have no meaning nor any practical effect if it meant only

the reference to a number of the said tariff, this question of numbering being in itself indifferent;

Considering that the meaning of this reference to No. 510 is made clear historically by the fact that, prior to the convention, steam turbines had been assimilated, in regard to tariff treatment, by an administrative decision of the General Direction of the Customs of France, to stationary steam engines, and that thus the adoption of the note had the particular signification to give to it the value of an international engagement, in order to remove it from changes of unilateral interpretation of the French customs administration;

Considering that, in the circular giving effect to the Franco-Swiss convention of October 20, 1906, the General Direction of Customs in France called attention, on November 22 of the same year, to the fact that "the convention stipulates a certain number of regulations which confirm the facilities already existing or regulates the details of execution. These clauses or administrative attitudes are enumerated in the present circular under the articles which concern it; they shall receive their application during the entire life of the convention." The circular, in regard to No. 510, inserts the words: "steam engines, administrative note *confirming* the classification of steam turbines under No. 510. Steam turbines are treated as stationary steam engines." (1st Swiss Memoir, p. 8.)

Considering that the French administration has itself in this way furnished the interpretation and indicated the meaning of the note by stating that the question was that of continuing the previous tariff practice, this practice having become obligatory for the whole life of the convention;

Considering that, if France has retained control over her tariff in regard to the rates for engines enumerated under No. 510, rates which she refused to consolidate in the commercial convention concluded with the Helvetic Government and which, in consequence, she was free to modify, she could make use of this control only within the limits of the engagement with Switzerland for treating turbines like the engines of No. 510;

Considering that at the time of the elaboration of the new French tariff in 1909-1910, increases in duties, aiming especially at turbines, were adopted by the Chamber of Deputies, then, in spite of the opposition of Switzerland, were proposed by the customs commission of the Senate; that this assembly, it is true, has finally eliminated the express

mention of turbines, but has imposed, without discussion, upon steam engines without piston an extra tax of 50 per cent of the duties on other stationary engines; that this additional tax was adopted a few days later, also without discussion, by the Chamber of Deputies, and was embodied in the tariff law of March 29, 1910;

Considering that in fact there seems to exist in trade practically no stationary steam engine without piston other than turbines;

Considering that in placing an additional duty of 50 per cent upon steam engines without piston, the new French tariff has in reality created a differential treatment to the detriment of steam turbines, which is not compatible with the tariff assimilation existing before the convention of 1906 and confirmed by the report of 1906;

Considering, finally, in regard to the Swiss request for the refunding of additional duties collected since April 1, 1910, upon turbines at the time of their entry into France, and also in regard to an allowance of an indemnity for the profits not realized for more than two years in consequence of the collection of additional tariff duties that the tribunal has received no precise and relevant indications regarding the number, the weight, etc., of these importations; that it is difficult to decide under these conditions upon indirect damages and loss of profit, and that, moreover, friendly and cordial relations existing between the contesting parties make it desirable not to deduce rigorously all the juridical consequences that might result from the considerations above developed;

FOR THESE REASONS,

DECREES:

1. France must apply to turbines of Swiss construction the tariff treatment especially indicated in regard to stationary steam engines with piston under No. 510 of the tariff of March 29, 1910. This decision has no retroactive effect. It goes into immediate effect.

2. No lump indemnity is allowed to the Swiss Government for the decrease in shipments of steam turbines from Switzerland into France, which may have indirectly resulted from the additional duties collected upon engines since April 1, 1910.

Done at Paris, August 3, 1912.

The President,
REAY.

The Secretary,
JAROUSSE DE SILLAC.

ITALY V. COLOMBIA (THE CERRUTI CASE)

Report of the Mediator

Madrid, January 26, 1888

In virtue of the powers conferred upon Spain by article 2 of the preceding protocol,¹ the mediating government, in the month of October, 1886, invited those of Italy and of Colombia to present their respective allegations. The date for the presentation of the evidence not having been stated in the beginning it was fixed for the 30th of September last, and Spain declared that it would not receive any documents after that date. At the same time, in consequence of the delays which would forcibly result from the examination of the different cases submitted by Italy, Spain offered to divide the mediation in two parts, the first was to relate to Ernesto Cerruti, and the second was to include the claims of other Italian subjects. That proposal was accepted by the two parties.

In December, after having received the last documents, the Spanish government has examined carefully every antecedent submitted to it, and draws therefrom the following conclusions of fact and of law:

FACTS

Ernesto Cerruti was born in Turin in 1844. He followed the profession of arms, and was in 1868 on the retired list, and, later, went to Colombia, where he settled first at Buenaventura, and subsequently at Cali. In July, 1871, he tendered his resignation as commissioned officer in the Italian army, which was accepted, and the same year contracted a civil marriage with the daughter of an Englishman and a Colombian woman, by whom he had seven children.

As early as 1870 he was appointed consular agent of his country, by the consul general of Italy at Panama. He ceased to perform the duties of that post in 1872 in consequence of a decision by the government of Italy.

In March, 1872, negotiating with a special delegate of the government of Cauca, of which General Jeremias Cardenas Mosquera was President *de facto*, he signed a contract whereby he agreed to purchase in the United States of America, and to bring into the port of Buena-

¹ Printed in Supplement, p. 238.

ventura, 500 rifles and 100 Remington carbines with their bayonets, 600,000 cartridges, sabres, and other similar equipments. The contract was to be executed with the greatest secrecy, and it was fulfilled on the 22d of June of the same year; but public attention having been drawn to it, and having caused many comments, it was brought before the legislature of the State in 1873 and before the courts in 1879, but the result of these proceedings does not appear. These facts gave a great notoriety to Cerruti in the State of Cauca. By a notarial act of the 27th of February, 1873, Cerruti established a commercial firm under the name of "E. Cerruti & Company," with Jeremias Cardenas, Ezechiél Hurtado, and Lope Landaeta, all three generals of the Republic. That firm, which was to continue until 1875, was engaged in the sale of salt, and the price of that product having risen to one *peso* in a few days, the Secretary of Finances of Cauca requested Cardenas, Hurtado and Landaeta, as members of the firm, to abandon supporting that monopoly for the sake of the poor. They replied that notwithstanding their position as simple "agents of the firm of Cerruti, and while waiting to be authorized by it to lower the price, they would sell salt at a reduction of 20 cents, in consequence of which dissatisfaction would cease." This new fact drew still more public attention upon Cerruti.

During the political troubles which occurred in Colombia in 1876 and 1877, Cerruti rendered some services to the government of Cauca; he furnished it with powder, shots, and other merchandise; he accompanied several of its members to the camps in military expeditions, and frequented official circles. At the same time, during February, 1877, *he took a personal part in the arrest and conduct into exile of the Bishop of Popayan*, a measure executed upon the order of Mr. Cesar Conto, President of Cauca, who had given it at the request of a political society of Cali. Cerruti explains his intervention as having been made at the request to him by Conto, though the latter had said: "It is evident that the government was not going to use Cerruti for the expulsion of the bishop, as he was not only a foreigner *but also consular agent of a foreign government.*" That political fact then remained subject to various appreciations and different opinions. That circumstance added still more to Cerruti's notoriety.

By a public act of July 28th, 1879, Cerruti, Jeremias Cardenas, Ezechiél Hurtado, Virgile Quintana and Joseph Quilici formed a commercial firm under the name of "E. Cerruti & Co.," with branches at Cali, Buenaventura, Popayan, and Palmira. They were all business

partners except Cerruti, *who was considered as the only capitalist in the firm*. Ferdinand Ayala and Vicente Guzman, who became Cerruti's partners after 1877, were to receive a share in the business transactions at Palmira.

Attention is called to two clauses of that contract: the twentieth, stating that the partners agreed to draw a private contract having full force for the settlement of the interests of their partnership and mutual obligations, and the twenty-first, which says: "Although aliens are protected by international law, and although they can cause the execution of the agreements entered into without any contract, the members of the firm place themselves *under the international guarantee represented by Mr. Cerruti as owner of the capital of said firm.*"

The effects of that act, which was to end in July, 1884, were extended by another of the 2nd of October, 1885.

By the agreement of September 29th, 1879, Belisario Buenaventura sold to the firm of "E. Cerruti & Co.," merchants at Cali, the property called "Salento," situated in the district of Yumbo in that municipality, including a house with all its furniture, agricultural and grazing lands, goats, horses, and various implements. Part of the property was paid for by the exchange of a house situated in the St. Peter quarter of that city, belonging to Quilici, one of the partners.

In 1882, Cerruti, no longer consular agent, took part in the elections by supporting the candidacy of General Tomas Rengifo for President of Cauca.

The political conduct then attributed to Cerruti and the facts above referred to drew upon him the antipathy of a part of the population, General Payan, President of Cauca in 1884 and 1885, and his secretary of the government, General Juan de Dios de Ulloa, who, with their partisans, believed him to belong to the opposition.

The fact that the partners of the firm of E. Cerruti were distinguished military officers and eminent politicians, contributed not a little to confirm that belief. Moreover, he was pointed out as being *an enemy of religion, because he had served under Garibaldi; abjured the Catholic faith, which was that of his ancestors, and of his wife, to contract only a civil marriage with her; he had taken part in expelling the bishop, and because he always entertained feelings of hatred toward the clergy*, which, on its side, had no sympathy for him. He was also accused of inspiring the political views of his partners, and to have supported them in their strifes, by contracting for arms in 1872; of taking part in their political

meetings, in using his influence with those who held high official positions at the time; in allowing to be published, without protesting, pamphlets which, supposing *him to possess a large fortune, ascribed to him a part in all the events; in entertaining General Rengifo during the elections, and in accompanying him and acting as his agent near his partner Hurtado, who, in 1879, was made President of Cauca by the insurrection.*

During that period, General Juan de Dios Ulloa, who commanded at Cali, asked the inhabitants to contribute to the support of the insurgent forces, but Cerruti declined to do it. Later, at a banquet, given by General Hurtado, Payan declared frankly and publicly to Cerruti that as soon as his political friends tried to rise against the government, he would place himself at the head of 500 men, and would not leave a single spool of thread in any of his stores; and there are proofs that before the outbreak of the revolution of 1885 the government of Cauca ordered by telegraph the chief of the municipality of Cali to sequester the property of the firm of Cerruti should the least agitation take place there; upon these facts Cerruti bases his affirmation that Payan and Ulloa hated him and were prompted by that feeling when they persecuted him afterwards.

On November 30th, 1884, the authorities ordered that a search be made on the property of "Salento" for arms, which were not found, but it is to be observed that on that occasion a subterranean vault was discovered, whose existence was unknown.

On January 19, 1885, a part of the Colombian guard, whose colonel was Guillermo Marquez, revolted at Cali and formed a provisional government; the insurgents maintained themselves for seventeen days, until, having been routed in the fight at Vigés, they fled before the troops that remained faithful, commanded by General Juan Evangelista Ulloa, son of the secretary of the government, which, on February 6th, the day after the battle, entered Cali. The victorious troops then occupied the property of "Salento," pointed out as the centre of the rebels' operations, and found there a machine gun, gun carriages, boxes of ammunition, dead bodies, and traces of a recent encampment.

According to Colombian authorities, Cerruti's participation in the civil war of that year consisted in that *he had distributed arms to the rebels; had furnished them with funds taken from the Bank of Cali; had given them rallying badges (red ribbons) which he also wore; that he had been intimately associated with them, and that most of his friends had taken part in the rebellion.* After having examined these charges in the light

of the proofs adduced and without stopping to analyze the character of every one, even supposing them to be absolutely established, it is not shown that Cerruti had distributed arms to the rebels, nor that he wore revolutionary badges.

It can be admitted that his partner Hurtado participated in the rebellion; that Quintana, Ayala, and Guzman held official positions in various places at the beginning of the movement; that Cerruti had appointed himself director of the Bank of Cali, whose vice-president he was; that the property of "Salento" having been occupied by the rebels, he remained with them; that he tendered his good offices to third parties as an influential friend of the insurgents, and that he took steps to have set at liberty persons who had been arrested by them.

Among the complaints made by Cerruti he cites the pillage of the property of Salento, which lasted several days, from which jewels, valuables, cattle, furniture, clothing, and provisions had been carried away, besides other damages done to the place.

He says that the mob of Cali threatened him with death, and that it had been proposed to expel his family from his house and turn it into a barrack. The intervention of some friends prevented this from being done.

The chief of the municipality of Cali declared that on the 12th of February, 1885, Cerruti had lost his condition as a neutral, and was liable to the responsibilities and charges imposed by the laws on the native citizens and in conformity with the decree of the executive power of Cauca, invoking law 38 of 1879 and the eighth of 1883, and without it appearing from them that the personal properties of Cerruti had been confiscated, those of the firm of "Cerruti & Co." owned in Cali, Buenaventura, Popayan, and Palmira, whose value was to be applied by the State to provide for the expenses of the war, were sequestered.

On the 24th of March following, the chief of the municipality of Cali informed Joseph Quilici that, his neutrality being known, his share in the firm would not be included in the prosecution against the property of the firm of "E. Cerruti & Co.," and invited him to intervene in the liquidation of the firm that was to be made to ascertain the extent of that share.

In April a passport having been asked for Cerruti, who desired to go to Bogota for the purpose of defending his rights, it was refused to him, alleging that he was on trial, although it was only later on the 4th of August, that came the act of the judiciary of Cauca ordering his trial

and his being placed under arrest and at the time that the Italian armored vessel "*Flavio Gioia*" entered Colombian waters. On January 2nd, 1886, the judiciary power of Colombia, after leaving without effect the decisions of the judiciary power of Cauca, began a new criminal action against Cerruti and ordered his imprisonment conformably to the national laws of the Republic. This procedure remained without effect, like the preceding one, in virtue of the provisions of the protocol of Paris.

The real estate of Cerruti that had been sequestered and which it was agreed should be returned to him was neither accepted by him nor by his partners, owing to the difference between their present value and the one it had prior to the sequestration.

LEGAL CONSIDERATIONS

I

The statement of the preceding facts, resulting from a careful examination of the depositions and documents presented, requires, before judging the events themselves, an examination of them as a whole and the general condition of the country where they occurred. It is evident that, on one side in order to appreciate the conduct of Mr. Cerruti, and on the other that of the authorities of Cauca, it is essential to go back to the condition of the struggle and antagonism of the political parties during the period extending from 1872 to 1886. Under such circumstances those who, in a country so frequently disturbed, were engaged in business or developing some industries were necessarily obliged to bear the consequences of those vicissitudes of public life or to take side with one of the contending parties, to be more or less closely connected with it, either to save their position or in hope to see the realization of their projects.

It is therefore evident that hate and animosity, which take gigantic proportions in political strifes, were to affect all those who sympathized with the opposite faction. It is in that way that Cerruti, living in the company of some of the defeated partisans of the revolution of 1885, his adversaries, already incensed against him, looked upon him as an accomplice in every movement that might occur. Therefore the facts presented by both parties, the sojourn of the rebel troops at Salento, and later the occupation of that property by those of the government, the abuses committed, the threats against Cerruti, his connection with those engaged in the struggle, the testimonies and allegations which, after-

ward, formed the basis of the accusations, assume a political character to such a degree that one cannot separate the facts and their legal importance from the passion and heat of the strife.

II

This point of view, indispensable in order to be able to appreciate facts that occurred during such a long period, renders very difficult the appreciation of the events without going beyond the narrow limits assigned to the mediation by the protocol of Paris, and taking for basis those accepted by the two governments. In that hypothesis, Ernesto Cerruti was and still remains an Italian subject, and the occupation and sequestration of his properties by the Cauca authorities or any other of the Colombian nation are considered in it as unjust inasmuch as an order was given to restore them to him. Even in the wording of the protocol, and in the agreements of the two parties acceded to by them, there are some points which almost completely prejudge the whole question, and this is so true that, from the reasoning founded exclusively upon the simple statement of facts, consequences would be derived very different from those one is obliged to deduce if conforming with the basis of the mediation.

In effect should abstraction be made of the latter, the fundamental question to be examined would be to ascertain whether Cerruti had or not preserved his rights to Italian protection after the acts attributed to him.

The question thus set forth, the present case would simply be reduced to the examination of certain facts, to prove or demonstrate them to arrive at the decision whether an alien who interfered in local affairs, and took part in the political strifes of the State in which he resides, had lost his nationality on account of these facts, or, even preserving them, could have been expelled or condemned by the offended State.

Far from this being the case, the main question is already solved, and in its place an entirely new one is presented, defined in a different manner in practice, and not more determined by writers on international law, such as the question of the neutrality of an alien. There can be no doubt that the alien has no right to meddle with local affairs of a country not his own, and the doubt is still less admissible when it relates to acts of rebellion; but the sanction of these cases and the right of the government that is attacked are secured by the expulsion of the alien, which seems to be the most efficacious means in matters of rebellions or sedi-

tions, or by the application of local penal laws in conformity with the provisions stipulated in treaties. If, instead of decreeing the expulsion or of applying to him the penal laws, he is allowed to remain in the country; if, for a long term of years, acts similar to those which, at a given moment, are considered as illegal, are endured; and if, moreover, the proof is established that those by means of excited elements and testimonies obtained during the strife, the question goes beyond the limits of the law to be discussed exclusively upon the ground of political appreciation.

The Italian government, informed of the claims of Cerruti, came to his aid, prompted, no doubt, by the considerations we have stated, and viewed the question as it was put—seeing that the authorities of Cauca neither expelled nor condemned Cerruti, and, without refusing to recognize the rights of his original nationality, declared him guilty before bringing him before a court, refused him a passport, and sequestered his property, long before submitting his acts to the impartial appreciation of the judicial power.

Such conduct must necessarily have raised the international question, for, taking as a starting point, the acknowledgment of an alien's nationality and the existence of treaties, the State of Cauca could not apply to him the laws subsequent to the latter, and which, in case they concerned him, could not have been promulgated without the knowledge of the government of his own country, interested in that modification. Therefore it is clearly seen, in what illogical reasoning the question was inclosed and the danger there was to change the terms by which it was placed until now by international law, which consist in affirming or denying the nationality of foreign subjects; for once affirmed, should the foreigner fail in his duties, he can be expelled or subjected to the penal law with the knowledge of his government; and when once denied, every law of the country can be applied to him; but that theory is inadmissible, and it would be imprudent to apply it to an intermediate condition in which there do not exist nor can be found the necessary elements so as to impose upon the two governments the solution of the difficulty. Such a situation would, fatally, lead to a conflict, and justify the use of force.

III

The difficulty submitted to the mediation must also be examined under a point of view of great importance; it results from the fact Cer-

ruti's sequestrated properties belonged to a commercial house which in itself is national and could not be considered as foreign.

Because, in effect, whatever may be the nationalities of the individuals composing a firm, the latter cannot be developed and be sustained save under the legislation of the country where it is established, and all the rights upon which are based the privileges of nationality and the condition of an alien rest upon shallow foundations when relating to that moral being called a commercial firm. If it is guilty, it is responsible, and the nationality of its members has nothing to do with it. But in the present case, and for inexplicable reasons, the authorities of Cauca hastened to declare that Joseph Quilici, a partner, having remained neutral, his share would be respected, while, for a contrary reason, they sequestrated that of Cerruti, although recognizing his quality as an alien.

If this jurisprudence were admitted by private international law, the internal legislation of a country would *de facto* be annulled in matters relating to commercial houses; it would be sufficient for that purpose to admit an alien as a member of the board of directors, or to make him sign some papers of the firm. And, if it was alleged that upon liquidation of a firm, his share would be separated from the responsibility of the others, it is evident that a liquidation could not be made, and that none of the legal rules followed in such liquidation could be applied without the intervention of the partner left out, who, invoking his character of an alien, could ask and obtain the intervention of his government, and thereby completely annul the action of the authorities. A more dangerous principle could not be introduced in the relations between two nations, and to a judicial point of view a less admissible one; it is the duty of the mediating government to make the most positive reservations on that subject.

IV

Finally, it evidently appears, and that is the most prominent point which best states the question, that the national authorities, that is to say, the central government of Colombia, have given evidence in several documents of the uprightness of their intentions while presenting at the same time judicial aspect the controversy submitted to the mediation, and determining the sphere within which the latter could act. These documents are: The decree of August 19, 1885, which specifies the jurisdiction to which are submitted aliens accused of acts of rebel-

lion; and the communication of July 29, 1885, of the Secretary of Foreign Affairs of the Union to that of the government of Cauca.

In that communication, the national government of Colombia with an exalted view in accordance with the gravity of the case, and a certainty of judgment that the mediator is happy to recognize, throws a light upon the legal and judicial status of Ernesto Cerruti, and annuls the entire proceedings directed against him by the State of Cauca; it first begins by affirming that in the present case no other procedure could be adopted, nor other depositions than those contained in the national law 60 of September, 1882, and in no manner whatever the law 38 of 1879 of the State of Cauca, invoked by its authorities, and which, at all events, is anterior to the national laws, is in contradiction with it, in opposition with constitutional rules and the principles of international law; it adds that in no case, on account of war, neither the expropriation nor the penalty of confiscation of property shall be decreed; and finally, that the authorities were not competent to take cognizance of this affair, concerning an alien and a case of rebellion which were by laws subject to the jurisdiction of the national authorities.

After having thus stated the question of law, and coming to that of fact, the Secretary of State establishes that before proceeding administratively against Cerruti his conduct ought to have been inquired into to ascertain whether or not he was assimilated to the native citizens as to the charges and responsibilities imposed upon them by laws; he affirms that, judging from the documents in possession of the national government, consisting of inquiries about the facts, and information obtained from the local authorities, the suit against Cerruti had not begun then; that before any act of procedure, whatever may have been the general opinion concerning Cerruti's conduct, a legal evidence of his undue interference in the rebellion had to be obtained; that it is hardly shown that Cerruti had been accused of having given clandestine aid to the rebels; that the application of the laws of war to an alien, considered *prima facie* as neutral, must have been fully justified; and, consequently, it was equally necessary to prove the exception showing that that alien had trampled on his character of neutral; and, finally, that he was to be considered as being subject to the jurisdiction of his native country, as long as he was not clearly implicated in the rebellion.

After these clear and precise declarations, entirely in conformity with the general international law, and which do honor to the independence and exalted views of the government of Colombia, the documents re-

ferred to establish other principles from which the sentence of the mediator must logically be deduced. These are the principles: When the expropriation of alien's properties, justified and rendered necessary by war, shall have been made without declaring that they had lost their neutrality, that is to say, before a previous declaration of their guilt, the confiscated properties shall be restored, and in addition the alien shall be indemnified for the damages resulting from an illegal procedure; that Cerruti ought to have been put back in possession of the land taken from him, to have tried and to have an account taken of the value and nature of the personal property expropriated for the requirements of the war.

In virtue of these declarations of the central government everything that had been done in the State of Cauca was annulled and the case carried before the national judicial powers which, in its procedure, utilized only the information previously obtained in Cauca.

The suit, however, did not extend beyond a period of preliminary examination in which Cerruti did not intervene, and was closed by the protocol of Paris on the 24th of May, 1886.

CONCLUSIONS

Relying upon the preceding considerations, the mediating government answered the three questions submitted to it.

First question. — Did or did not Cerruti lose his condition of neutral alien in Colombia?

If the acts attributed to Cerruti were true, and if the government of Colombia took the precaution at the time they were committed to secure positive evidence to that effect, there is no doubt that his condition of alien would not have prevented his expulsion from the country with all the consequences that the laws of the country and the treaties in force between Italy and Colombia imposed upon him. In the present case the mediation is of the same opinion as the national government of Colombia, that in the procedure begun by the government of Cauca there is no sufficient evidence of Cerruti's alleged participation in the civil war; it affirms that prior to that time there was neither any new procedure duly establishing the facts; and, finally, it considers that the proofs presented during the mediation ought to be viewed in the same light that Colombia appreciated those furnished by the State of Cauca, and that they are not in the condition necessary to give them weight; therefore it could not be proved before a court that Cerruti was

guilty, nor that he had in consequence of that culpability forfeited the character of neutral mentioned in the protocol.

Second question. — Did or did not Cerruti lose the rights, prerogatives, and privileges granted to aliens by common law and the laws of Colombia?

The answer to the preceding question contains impliedly the answer that must be made to this one. Cerruti might, perhaps, have lost, or ought to have lost, the privileges of alienage on account of his conduct in Colombia; but judging from the evidence furnished, and the precedents submitted to the mediation, it is clear that he has not lost these prerogatives. It must be added that in no case could he have lost the privileges granted by common law nor those which the laws of Colombia grant to foreigners. This answer is suggested by the opinions expressed by the Secretary of State of the national government of Colombia in his report of July 29th, 1885.

Third question. — Must Colombia pay or not an indemnity to Ernesto Cerruti?

The mediating government will answer that question in the same terms as those of the Secretary of State of Colombia, terms which it finds in conformity with the law and perfectly pertinent; it rests, besides, upon article first of the protocol of Paris, whereby it is ordered, as the government of Colombia had already done, that the sequestered properties be restored to him. From that resolution are forcibly derived the two following consequences:

1. That the sequestration of the estate by the government of Cauca not being according to law, consequently that of the personal property could not be.

2. That the restoration of the estate necessarily implies that of the personal property and cattle, if the first resolution is to be made according to equity, and, if that is not possible, there shall be cause for an indemnity for what shall not have been restored.

The mediating government must, however, give more precision to his opinion upon that point by explaining in his decision that, in his judgment, the condition of the law existing in February, 1885, must be re-established as it was at the time the property was sequestered by the authorities of Cauca, and in that sense the word *indemnity* must be understood relatively and only in case the restoration could not be possible.

The mediating government, in performing the task intrusted to it,

considers it its duty to declare that the line of conduct followed and the doctrine laid down by the general authorities of Colombia, set forth in a style as brilliant as it is vigorous, in the communication dated July 29th, 1885, of the Secretary of State, Mr. Restrepo, are in harmony with all the prescriptions of international law, and show that in the midst of troubles and difficulties that disturb the sovereign States of the confederation the central government maintained intact those principles of justice and of international law which entitle it to the consideration of other countries, and favor the development of friendly relations with other nations.

Therefore the opinion of the mediator is that his proposal, whose aim is to establish the condition of the law violated by the authorities of Cauca in February, 1885, must favor and imply necessarily the re-establishment of the cordial relations between Italy and Colombia, unfortunately interrupted by those painful events for which the central government could not be made responsible.

Madrid, January 26th, 1888.

The Minister of State of His Catholic Majesty,

SEGISMUNDO MORET.

Award of the President of the United States under the protocol concluded the eighteenth day of August, in the year one thousand eight hundred and ninety-four, between the Government of the Kingdom of Italy and the Government of the Republic of Colombia

Washington, March 2, 1897

This protocol, concluded August 18, 1894, between the Kingdom of Italy and the Republic of Colombia, was entered into for the purpose of putting an end to the subjects of disagreement between the two governments growing out of the claims of Signor Ernesto Cerruti against the Government of Colombia for losses and damages to his property in the State (now Department) of Cauca in the said republic during the political troubles of 1885, and for the further purpose of making a just disposition of said claims. By the terms of the protocol each government agreed to submit to arbitration the matters and claims above referred to for the purpose of arriving at a settlement thereof as between the two governments, and they joined in asking me, Grover Cleveland, President of the United States of America, to accept the position of arbitrator

in the case and discharge the duties pertaining thereto as a friendly act to both governments, vesting in me full power, authority, and jurisdiction to do and perform and to cause to be done and performed all things without any limitation whatsoever which, in my judgment, might be necessary or conducive to the attainment in a fair and equitable manner of the ends and purposes the agreement is intended to secure.

Pursuant to the terms of the said protocol, the two governments, and the claimant, Signor Ernesto Cerruti, as one of the two parties interested in the suit, have submitted to me within the time specified in said protocol the documents and evidence in support of their several asserted rights.

Now, therefore, be it known, that I, Grover Cleveland, President of the United States of America, upon whom the functions of arbitrator have been conferred as aforesaid, having duly examined the documents and evidence submitted by the respective parties pursuant to the provisions of said protocol, and having considered the arguments addressed to me in relation thereto, do hereby decide and award:

1. That the claims made by Signor Ernesto Cerruti against the Republic of Colombia for losses of and damages to the real and personal property owned by him individually in the said State of Cauca, and the claims of said Signor Ernesto Cerruti for injury sustained by him by reason of losses of and damages to his interest in the firm of E. Cerruti and Company, are proper claims for international adjudication.

2. That the claim submitted to me by Signor Ernesto Cerruti for personal damages resulting from imprisonment, arrest, enforced separation from his family, and sufferings and privations endured by himself and family is disallowed. I therefore make no award on account of this claim.

3. The claim of Signor Ernesto Cerruti for moneys expended and obligations incurred for legal expenses in the preparation and prosecution of this claim, including former and present proceedings, is disallowed by me.

4. I award for losses and damages to the individual property of Signor Ernesto Cerruti in the State of Cauca, and to his interest in the co-partnership of E. Cerruti and Company, of which he was a member, including interest, the net sum of sixty thousand pounds sterling, of which sum ten thousand having been paid, the Government of the Republic of Colombia will, in addition, pay to the Government of the Kingdom of Italy, for the use of Signor Ernesto Cerruti, ten thousand

pounds sterling thereof within sixty days from the date hereof, and the remainder, being forty thousand pounds, within nine months from the date hereof, with interest from the date of this award at the rate of six per cent per annum, until paid, both payments to be made by draft, payable in London, England, with exchange from Bogotá at the time of payment.

5. It being my judgment that Signor Cerruti is, as between himself and the Government of the Republic of Colombia, which I find has by its acts destroyed his means for liquidating the debts of the copartnership of E. Cerruti and Company for which he may be held personally liable, entitled to enjoy and be protected in the net sum awarded him hereby, I do, under the protocol which invests me with full power, authority, and jurisdiction to do and to perform and to cause to be done and performed all things without any limitation whatsoever which in my judgment may be necessary or conducive to the attainment in a fair and equitable manner of the ends and purposes which the protocol is intended to secure, decide and adjudge to the Government of the Republic of Colombia all rights, legal and equitable, of the said Signor Ernesto Cerruti in and to all property, real, personal, and mixed in the Department of Cauca and which has been called in question in this proceeding, and I further adjudge and decide that the Government of the Republic of Colombia shall guarantee and protect Signor Ernesto Cerruti against any and all liability on account of the debts of the said copartnership, and shall reimburse Signor Ernesto Cerruti to the extent that he may be compelled to pay such *bona fide* copartnership debts duly established against all proper defenses which could and ought to have been made and such guaranty and reimbursement shall include all necessary expenses for properly contesting such partnership debts.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in duplicate at the city of Washington on the second day of March, in the year one thousand eight hundred and ninety-seven, and of the Independence of the United States the 121st.

[Seal of the United States.]

GROVER CLEVELAND.

By the President:

RICHARD OLNEY,
Secretary of State.

Award of Arbitral Commission in the Cerruti case between Colombia and Italy

Rome, July 6, 1911

By a *compromis* signed on October 28, 1909, the Government of the Republic of Colombia and the Government of His Majesty, the King of Italy, have agreed to submit the following three questions to arbitration:

I. — What is the amount of the sum which the Government of Colombia was obliged to pay and which it must pay in virtue of the claim of the late engineer, Gaspare Mazza, against the firm of E. Cerruti and Company?

II. — Among the delays which occurred in regard to the payment to Mr. Ernesto Cerruti of the indemnity granted to him by the Cleveland arbitral decision, delays which the Government of Colombia partly admits, which are the principal ones that have produced interest chargeable to the Republic and what is the amount of this interest?

III. — How much is due to the same Mr. Cerruti in conformity with and in execution of the last sentence of Article V of the aforementioned arbitral decision which, in the English text, is expressed as follows: "Such guarantee and reimbursement shall include all necessary expenses for properly contesting such partnership debts."

In execution of that *compromis*, the two governments have respectively appointed as arbitrators: Dr. Santiago Aldunate, envoy extraordinary and minister plenipotentiary of Chile to His Majesty, the King of Italy, and the Honorable Professor Pasquale Grippio, Vice-President of the Italian Chamber of Deputies, and, in virtue of the *compromis*, the arbitrators thus designated have named as umpire, Dr. Francis Hagerup, envoy extraordinary and minister plenipotentiary of His Majesty, the King of Norway.

The Arbitral Commission met at Rome on April 24, 1911. In accordance with the rules of procedure which it elaborated, memoirs, counter-memoirs and conclusions were duly submitted to the arbitrators and communicated to the parties, who presented their arguments orally before the Commission on June 28, 1911.

After having carefully deliberated upon these arguments, the Arbitral Commission renders the following award:

I — AS TO THE FIRST QUESTION:

Considering that from that which appears from the procedure and from the arguments produced by the parties, the facts appertaining to this question are as follows:

In the books of the firm of Cerruti and Company, there appeared an account of Mr. Gaspare Mazza, Italian engineer, which account, on January 31, 1885, acknowledged in favor of Mr. Mazza a balance of 19,089.355 Colombian *pesos*.

This balance is composed of the following items:

Balance of the current account	<i>pesos</i>	1,210.610
Honoraria, etc., for engineering work executed for the firm	"	5,038.200
Interest	"	1,866.055
Amount in gold paid to E. Cerruti	"	8,635.290
Agio on the latter sum, converted into the current Colombian money	"	2,339.200
Total	"	19,089.355

It appears from the said books that the interest is paid half-yearly at compound interest of 7 per cent.

As to the origin of the credit resulting from the payment of the sum of 8,635.290 *pesos* in gold made to Mr. E. Cerruti, the latter, who was partner and the manager of the firm of Cerruti and Company, expresses himself in a letter to Mr. G. Mazza, dated July 29, 1893, in the following terms:

(See document No. 5 presented with the second memoir of the agent of the Colombian Government):

The amounts were conveyed to me unconditionally. Ten thousand lire were handed to me by you at Paris before leaving for America. Twenty thousand francs were handed to my brother-in-law, Panicali; the rest of the amount was handed at two different times to Mr. Heurtematte of Paris, and thus I avoided the forwarding of the sums in Europe, whilst you had your money at any time you might have asked for it.

I have thought of placing this amount with the firm, but you always told me that you only recognized me and no one else of the firm, for which I am the responsible party.

I simply thought of crediting you in its books with an annual interest of 7 per cent without your having to ask me for it, and to discuss it later on.

In order to effect your deposit on the books, I had, of course, to convert it into Colombian money, the first ten thousand lire at a 10 per cent agio and the other at 20 per cent. But I am obliged to restore the sum to you, together with the agio in the proportions above-mentioned and to effect the restitution in francs as I had received it.

There is, moreover, presented a receipt for the said claim signed in the name of the firm of E. Cerruti and Company by its partner, Mr. Quilici, on October 28, 1885, which is as follows: (Document No. 3 presented with the first memoir of the agent of the Italian Government and Document No. 8 presented along with the first memoir of the agent of the Colombian Government):

In the name of the firm of Ernesto Cerruti and Company of Cali, we explain that the engineer, Gaspare Mazza, as shown by the books and by the balance of accounts of the firm, from January first of the current year, is creditor of the said firm in the amount of fourteen thousand, eighty-nine dollars and three hundred and fifty-five mills (\$14,089.355), the amount which the said engineer left with our firm as a deposit with the sole condition of being able to withdraw it at his will, and besides an amount of five thousand dollars (\$5,000) for works executed in various mines for the account of our firm, which constitutes a total of nineteen thousand, eighty-nine dollars and three hundred and fifty-five mills (\$19,089.355). This amount, upon the breaking out of the revolution, we could not hand to the said Mr. Mazza because the Government seized all our property. Our firm then decided to pay the monthly interest of one per cent, which is the current interest in the business transactions of this country, until the firm should be able to recover its property, without prejudice of the greater damages which the delay might occasion.

The Colombian Government, upon which Article V of the Cleveland arbitral decision of March 2, 1897 imposed the obligation to protect Mr. E. Cerruti against any responsibility arising from the debts of the firm of E. Cerruti and Company, declared itself on February 8, 1899, disposed to pay the claim of Mr. G. Mazza in Colombian money (with a premium at first fixed at 20 per cent, and later raised to 40 per cent). But Mr. G. Mazza, who demanded that he be paid in gold, did not accept this offer. The Colombian Government, in the month of September, 1899, sent as payment of the said claim a sum of 22,907.22½ pesos in current money to Mr. Welby, Minister of Great Britain to Bogota, who, at the time, was the representative of Italy to the Colombian Government; and having accepted this sum subject to subsequent in-

structions from the Italian Government, Mr. Welby deposited it in the bank of Bogota. (See Document No. 4 presented with the first memoir of the agent of the Colombian Government, page 39.) In April, 1897, Mr. G. Mazza had already tried to secure from the judicial authorities of Italy an attachment against the sum of 50,000 pounds sterling paid by the Colombian Government to the Italian Government in virtue of the Cleveland arbitral decision as an indemnity to Mr. E. Cerruti for the confiscation of his property during the revolution of 1885. The writ of attachment granted by the President of the Rome Tribunal was affirmed by the Court of Cassation which, by a decree of July 9-27, 1901, sent the affair back to the Court of Appeals of Pérouse to be adjudicated in regard to the principle involved. By judgment of the latter court, dated March 24-April 1, 1902, Mr. E. Cerruti was condemned, both in his own name and in his capacity as partner of the firm of E. Cerruti and Company, to pay to General Mazza as heir of the late engineer, G. Mazza:

I. — The sum of 59,539 lire in gold, with interest from January 1, 1885, at an annual rate of 7 per cent, due and current until the final payment should be made;

II. — The sum of 21,739.10 lire in current money, with interest at the legal rate of 5 per cent, beginning with April 12, 1897 (date of the summons);

III. — The legal costs incurred in the affair by Mr. Mazza (besides the expenditures of the Italian Ministry for Foreign Affairs, a party to the litigation in its quality as depository of the sum sequestered by Mr. Mazza).

In virtue of this decision, Mr. E. Cerruti on April 3, 1903, paid to General Mazza the sum of 181,359.46 Italian lire.

Considering that in the matter of the 5,038.200 *pesos* due to the late engineer, G. Mazza, as honoraria, it is not disputed that this sum was a debt incumbent upon the firm of E. Cerruti and Company;

Considering, in regard to the remainder of the said credit, that the responsibility of the Colombian Government in this matter depends on the question as to whether or not the sum recorded in the books of the firm of E. Cerruti and Company on account of Mr. Mazza was paid into the treasury of the said firm; and considering that the Commission, after having carefully considered all the circumstances pleaded by the agent of the Colombian Government, which circumstances are of a nature to raise doubts regarding the regularity of the keeping of these

books, in view of the sum total of facts presented to the Commission, and especially in view of the acknowledgment of the debt on the part of the Colombian Government, established in the payment offered by it in the month of September, 1899, must recognize that this payment was made;

Considering that the payment made to the firm of E. Cerruti and Company by Mr. Cerruti in the name of Mr. Mazza with the intention of establishing for the latter a claim against this firm beside the obligation personally assumed by Mr. Cerruti, — whether we apply to the case the rules of *contractus in favorem tertii*, or whether we look upon the payment as a *negotiorum gestio* — was obligatory upon the said firm, even if the payment was made without the authorization of Mr. Mazza or without his knowledge, unless he protested against that act which he did not do, Mr. Mazza, on the contrary, having availed himself of his claim against the firm of E. Cerruti and Company by demanding payment thereof from the Colombian Government;

Considering that Mr. Cerruti, in paying the claim of Mr. Mazza, acquires the right to have legal recourse against the Colombian Government as successor, in accordance with the Cleveland arbitral decision, of the firm of E. Cerruti and Company, to the benefit of which the amount paid by Mr. Mazza finally accrued;

Considering that in the books of the firm of E. Cerruti and Company the claim is recorded in Colombian money, but that, in the spirit of the Cleveland arbitral sentence, we must, in the examination of the relations of the firm of E. Cerruti and Company and, in consequence, in the appreciation of the value of the Colombian money, place ourselves as far as possible in the situation existing before the confiscation of the property of Mr. Cerruti which occurred during the months of January and February, 1885;

Considering that for this reason the offer of payment made by the Colombian Government in 1899, which was based upon a greatly depreciated value of the Colombian money, was not sufficient;

Considering that in this case the parties have accepted the computation of the value of the claim made by the Court of Appeals of Pérouse, and that in consequence it is not necessary to establish the true value of the Colombian money in 1885;

Considering, in regard to the interest, that the sum paid by Mr. Cerruti in execution of the judgment of the Court of Appeals of Pérouse, amounting — omitting therefrom the legal costs of which we shall speak

hereinafter — to 167,216.56 Italian lire, represents a diminution of the indemnity granted to him by the Cleveland arbitral decision, and that, in conformity with that decision, he has the right to 6 per cent annual interest on the amounts not paid by him beginning with the date of the payment, April 3, 1903, but that, in accordance with the said decision, there is no justification to claim compound interest;

Considering, in regard to the legal costs, that this phase of the question will be settled by the stipulation regarding the third question brought before the Arbitral Commission;

II — AS TO THE SECOND QUESTION:

Considering that the facts relating to this question are the following: Article IV of the Cleveland arbitral decision adjudicated to Mr. Cerruti "the net sum of 60,000 pounds sterling, of which sum 10,000 having already been paid, the Government of the Republic of Colombia will, in addition, pay to the Government of the Kingdom of Italy, for the use of Signor Ernesto Cerruti, 10,000 pounds sterling thereof within sixty days from the date hereof, and the remainder, being 40,000 pounds, within nine months from the date hereof, with interest from the date of this award at the rate of 6 per cent per annum, until paid."

In consequence of this decision, 10,000 pounds sterling were paid to the Italian Government on June 5, 1897, 40,000 pounds sterling on December 2, 1897, and the 1800 pounds sterling constituting the interest on the 40,000 pounds sterling for the time elapsed from March 2 to December 2, 1897, were paid on October 14, 1900. These amounts, however, were not immediately and fully handed to Mr. E. Cerruti. Various creditors of the firm of E. Cerruti and Company and of Mr. Cerruti personally had obtained from the Tribunal of Rome a writ of attachment against the amounts which the Colombian Government had paid to the Italian Government as indemnity for Mr. Cerruti. By a decree of the Court of Cassation, dated February 4-28, 1899, the united chambers of this supreme court annulled one of these writs of attachment, granted in the interest of the firm of Isaac & Samuel. In the reasons given for this decision, the said court laid great stress upon the following consideration: "The Cleveland arbitral decision constitutes a measure of international order, and in so far as the granting of 60,000 pounds sterling to Mr. Cerruti for his use is concerned, the creditors of the firm of Cerruti and Company cannot bring legal action for claims

before the judicial authorities, in view of the nature of the arbitral decision, which is akin to an international treaty, because of the agreement entered into between the Government of Colombia and the Government of Italy, which latter received the indemnity to transfer the same to Mr. Cerruti, which transfer constituted on the part of the Government the execution of the diplomatic convention." This decree having annulled only the writ of attachment issued in the interest of the firm of Isaac & Samuel, and all the other writs of attachment issued in the interest of other creditors remaining in effect, the Italian Government decided that it could not pay to Mr. Cerruti the indemnity which it had accepted in his favor. Then Mr. E. Cerruti brought action against the Italian Ministry for Foreign Affairs before the Tribunal of Rome in order to obtain an order so that the indemnity paid by the Colombian Government might be paid over to him. The said tribunal, through its judgment of June 18-25, 1900, denied the request, which was granted, however (with the exception of some deductions for amounts advanced by the Ministry for Foreign Affairs or otherwise due by Mr. Cerruti), by a judgment rendered December 7-20, 1900, by the Court of Appeals of Rome, before which Mr. Cerruti had presented the affair.

The Court of Appeals of Rome, in the reasons given for its decision, advanced the opinion that the consequences of the aforementioned decree of the Court of Cassation, dated February 4-28, 1899, should have for necessary effect that the writs of attachment served against the indemnity granted to Mr. Cerruti by the Cleveland arbitral decision were inadmissible. Such, however, was not the opinion of the Court of Cassation before which Mr. Cerruti brought action against the decision of the Court of Appeals of Rome. By the decision dated July 9-27, 1901, already referred to herein, the Court of Cassation affirmed the writs of attachment issued in the interest of the debts contracted by Mr. Cerruti *personally* and independent of his quality as a partner of the firm of E. Cerruti and Company.

It was only on April 3, 1903, that the payment of 474,005 lire in gold, constituting at that time the remainder of the 50,000 pounds sterling paid by the Colombian Government, could be made to Mr. Cerruti.

Considering that the claims for interest made by all the parties concerned in consequence of the facts which have just been related may be summarized as follows:

- (a) Interest at 6 per cent on the first instalment of the indemnity

granted by the Cleveland arbitral decision for the sixty days between the date of this decision (March 2, 1897) and the date fixed for the payment of the first instalment of the indemnity (May 1, 1897). The obligation to pay this interest, which amounts to 98.12.7 pounds sterling is contested by the Colombian Government.

(b) Interest at 6 per cent on 10,000 pounds sterling for the 35 days from May 1 to June 5, 1897, during which the Colombian Government delayed the payment of the first instalment of the indemnity. The obligation to pay this interest (amounting to 57.10.8 pounds sterling) is acknowledged by the said government.

(c) Interest at 6 per cent — amounting to 309.10.0 pounds sterling — on 1800 pounds sterling, which was to have been paid as interest on 40,000 pounds sterling and which was paid after a delay of two years and 316 days. The obligation to pay this interest is likewise acknowledged by the Colombian Government.

(d) Annual compound interest at 6 per cent for the time during which Mr. E. Cerruti, in consequence of the judicial actions effected in regard to the sum deposited with the Italian Government, was prevented from using the indemnity granted to him by the Cleveland arbitral decision. The obligation to pay this interest is contested by the Colombian Government.

(e) This government has raised the question as to whether it is not proper to take account in its favor of interest on the sum of 10,000 pounds sterling paid by it on July 4, 1890, as an indemnity to Mr. Cerruti.

Considering, in regard to the interest hereinbefore mentioned under (a) that the terms of Article IV of the Cleveland arbitral decision "with interest from the date of this award at the rate of 6 per cent per annum, until paid" must, both in accordance with the construction of the above-mentioned article as well as the spirit of the decision, refer both to the first and second instalments of the indemnity;

Considering that it is not contested that the Colombian Government must pay the interest referred to under (b) and (c);

Considering that Mr. Cerruti had the right to reckon upon receiving the interest mentioned under (a), (b) and (c) on the amounts of 10,000, 40,000 and 1800 pounds sterling paid by the Colombian Government, so that Mr. Cerruti still appears as the creditor of the principals of 156.3.3 and 309.10.0 pounds sterling as results from the two following accounts:

	Principal	Interest
Mar. 2, 1897. First instalment of the indemnity assigned to Mr. Cerruti by the Cleveland arbitral decision. . .	£10,000	
May 1, 1897. Interest at 6 per cent on £10,000 from Mar. 2 to May 1, 1907 (60 days)		£98.12.7
June 5, 1897. Interest at 6 per cent on £10,000 from May 1 to June 5, 1897 (35 days)		£57.10.8
	£10,000	£156.3.3
June 5, 1897. Amount paid by the Colombian Government, £10,000.	£ 9,843.16.9	£156.3.3
Credit of Mr. Cerruti, June 5, 1897, regarding the first instalment.	£ 156.3.3	0
	Principal	Interest
Mar. 2, 1897. Second instalment of the indemnity assigned to Mr. Cerruti by the Cleveland arbitral decision.	£40,000	
Dec. 2, 1897. Interest at 6 per cent on £40,000 from Mar. 2 to December 2, 1897 (9 months)		£1,800
Dec. 2, 1897. Amount paid by the Colombian Government, £40,000.	£38,200	£1,800
	£ 1,800	0
Oct. 14, 1900. Interest at 6 per cent on £1,800 from Dec. 2, 1897 to Oct. 14, 1900 (2 years and 316 days).		£309.10.0
Oct. 14, 1900. Amount paid by the Colombian Government, £1,800.	£ 1,490.10.0	£309.10.0
Credit of Mr. Cerruti, October 14, 1900, regarding the second instalment.	£ 309.10.0	0

Considering that, in accordance with the Cleveland decision, the Colombian Government must pay the annual interest at 6 per cent upon the amounts not paid relating to the indemnity and that, according to the above accounts, the interest on the principals of 156.3.3 and 309.10.0 pounds sterling must be computed, respectively, beginning with the dates of June 5, 1897, and October 14, 1900, until the date of the final payment;

Considering, in regard to the interest mentioned under (d), that the Colombian Government, in paying to the Italian Government the amount granted by the Cleveland arbitral decision to Mr. Cerruti, acted in conformity with the dispositions of the said decision and, according to the general rules of law affirmed by the Court of Cassation of Rome, had the right to believe that the sum paid for the use of Mr. Cerruti would not be assigned to a use foreign to the dispositions of the said international act;

Considering that the Colombian Government cannot be held responsible for the delays occasioned by the detentions effected by the *personal* creditors of Mr. Cerruti and admitted by the above-mentioned court only because personal claims were concerned therein;

Considering that it is not necessary for the settlement of the question submitted to this arbitration to enter into a consideration of the divergencies of opinion which arose after the Cleveland arbitral decision between the interested governments with regard to the obligations imposed by this decision, because, whatever be the judgment in regard to the said divergencies of opinion, the Colombian Government cannot, in law, be held responsible for the sequestrations effected in violation of the aforementioned rules of law affirmed by the Court of Cassation of Rome, although the attitude of the Italian Government was incontestably correct when it refused the payment to Mr. Cerruti of the amount sequestered;

Considering, however, that the present Arbitral Commission is called upon, in accordance with the *compromis*, to adjudicate as well as a tribunal of equity, and, considering that, if the Colombian Government, according to strict law, is not obliged to reimburse to Mr. Cerruti the losses sustained by him in virtue of the aforementioned illegal measures resorted to in the interest of the claims of the firm of E. Cerruti and Company, for which the Colombian Government had assumed the responsibility, it seems equitable that Mr. Cerruti, who has not committed any fault with regard to those measures, does not bear alone the

pecuniary consequences which would sensibly decrease the indemnity granted to him by the Cleveland arbitral sentence, and that for this reason it seems equitable and according to the spirit of the said sentence to grant to him for loss of interest a lump sum of 200,000 francs in gold (without compound interest);

Considering, in regard to the interest mentioned under (e) that there is reason to affirm that the Cleveland arbitral decision, by the determination of the indemnity to be accorded to Mr. Cerruti, has taken into account the fact that this 10,000 pounds sterling had been advanced by Colombia and that he might have the enjoyment both of that amount and of the interest;

III — AS TO THE THIRD QUESTION:

Considering that the terms of Article V of the Cleveland arbitral decision, thus expressed in English "such guaranty and reimbursement shall include all necessary expenses for properly contesting such partnership debts" must be interpreted in the following manner: the Colombian Government which, according to the said decision, was to assume the responsibility for all the debts of the firm of E. Cerruti and Company, must reimburse to Mr. Cerruti all the expenditures incurred in good faith by the latter for the purpose of having the extent of his obligations established in a decisive manner;

Considering that the expenditures which relate to the Mazza credit — as well as those that are imposed upon Mr. Cerruti by the decision of the Court of Appeals of Pérouse and those which he had to meet for his defense in the various law suits relating to this affair — are, under the above-mentioned respect, of a mixed nature, some relating to the attachment effected in favor of Mr. Mazza and to the intervention in the lawsuit of the Italian Government as depository of the sequestered amount, others relating to the question of the nature of the claim — and that a distinction of the different groups of expenditures cannot be exactly established;

Considering that all the other lawsuits and judicial acts, for which Mr. Cerruti claims recovery of costs, have not for their object to establish the extent of the liabilities of the firm of E. Cerruti and Company, but to protect the amount paid by the Colombian Government against illegal attachments whose responsibility, according to what is stated above, does not in strict law devolve upon Colombia;

Considering, however, that the same reasons of equity that have

been invoked above have also their value in the question of legal costs and that for this reason it seems equitable not to make Mr. Cerruti bear all the expenditures and to adjudicate to him as an indemnity a lump sum of 75,000 francs in gold (without interest) into which amount enters, as one of its elements, a reasonable share of the costs imposed upon him by the decision of the Court of Appeals of Pérouse;

Considering that in accordance with the *compromis*, the Arbitral Commission is not competent to settle the questions raised by Mr. Cerruti regarding his personal damages and those which relate to the costs of the present arbitration;

Considering that in conformity with the *compromis* the amounts to be paid in virtue of the present decision must be stated in francs in gold, both in regard to the interest and the principals;

For these reasons, the Arbitral Commission declares:

I. — The amount of the sum which the Colombian Government must pay in virtue of the claim of the late engineer, G. Mazza, against the firm of E. Cerruti and Company is 166,589.49 francs in gold with interest, likewise in gold, at the annual rate of 6 per cent, computed from April 3, 1903, to the date of the final payment.

II. — The Colombian Government must pay as interest, because of the different dates on which were effected the payments to Mr. Cerruti of the indemnity which was due him.

(a) 3,950.11 francs in gold with interest, likewise in gold, at the annual rate of 6 per cent, computed from June 5, 1897, to the date of the final payment;

(b) 7,828.80 francs in gold with interest, likewise in gold, at the annual rate of 6 per cent, computed from October 14, 1900, to the date of the final payment;

(c) a lump sum of 200,000 francs in gold.

III. — The Colombian Government must reimburse to Mr. Cerruti the sum of 75,000 francs in gold for the legal costs paid by him.

Rome, July 6, 1911.

F. HAGERUP

SANTIAGO ALDUNATE B.

P. GRIPPO.

BOOK REVIEWS

A Treatise on the Laws Governing the Exclusion and Expulsion of Aliens in the United States. By Clement L. Bouvé. Washington, D. C.: John Byrne & Company. 1912. pp. 900.

The United States continues to be, emphatically, an immigrant-receiving nation. Its alien population shows no signs of diminishing, but continues steadily to grow by the uninterrupted access of new arrivals. Beginning in 1875, an important part of Congressional legislation has been directed toward the regulation of this immigration, by providing for the exclusion or return of aliens of various types or classes declared undesirable. Successive enactments have manifested a clear purpose of increasing the number of such classes and of making more certain the rejection before entry and the repatriation afterwards of the members thereof. An elaborate and efficient administrative organization has gradually been established for the execution and summary enforcement of these laws, whereby aliens of the proscribed classes are sifted out of the mass of applicants for admission and denied entry, or discovered later among the population and removed from the country. In the practical application of these statutes to particular cases, numerous questions arise, not only of interpretation or construction, but of right or power, on the part of the government, whether in its executive, legislative or judicial branches, on the one hand, and on the part of the individual on the other, — questions involving at times international relations no less than matters of domestic concern. Such questions have been the subject of diplomatic correspondence, have been involved in treaty stipulations, and have been considered in some seven or eight hundred judicial decisions. There has thus grown up a body of law — statutory, administrative and doctrinal — of no inconsiderable volume or importance. It is this body of law which is the subject-matter of Mr. Bouvé's work. No one else (in the United States) has undertaken to treat the subject comprehensively, systematically and fully. It is the first book of its kind dealing with the laws of this country.

The book is essentially a legal work; it does not purport to cover the political questions involved in the access of an alien population, nor the economic or social aspects of the problem, except as such considerations

as expressed in present policy may have a bearing on existing legal rules. In the field covered, however, which is a wide one, the survey is complete. Every statutory provision is scrutinized, and considered in various applications to individual cases, both actual and possible. All the decisions have been examined and classified, and are cited, compared, discussed, or otherwise utilized. But the book is much more than a full collation of statutes and authorities; it is that, and a systematic study or treatise besides. Much labor and painstaking thought have obviously and necessarily gone to the making of it.

The author's studies have led him to conclude that the body of law relating to the exclusion and expulsion of aliens in the United States cannot rightly be understood, if considered only in its purely administrative aspects or in the light merely of accepted principles of international law, but must be apprehended as "a distinct and important branch of municipal law." His treatment of the subject-matter, together with a certain arrangement, classification or division of topics, enables him to exhibit a symmetrical and finished scheme of legislation, as well as to develop what he regards as the governing principles and underlying reasons peculiar to this branch of the law, and to carry these principles into a great variety of detailed applications. The book begins (Chapter I) with an exposition of certain general principles, including the general right of governments to exclude or expel aliens, with its limitations imposed by international law, and a statement concerning the exercise of the power in the United States, which includes an historical review of the treaties concluded and laws enacted on the subject and a discussion of the constitutional power of Congress in the premises. The existing immigration law is then annotated and discussed section by section (Chapter II). The status of aliens is next treated in a chapter (III) which is probably the most important, as it is the most interesting, in the book, as chiefly reflecting the author's point of view and embodying his more far-reaching conclusions. The topics considered in this chapter include the acquisition and loss of municipal status by aliens, under the Chinese exclusion acts and under the immigration laws; the acquisition of citizenship, by birth, by naturalization, either directly, or through the naturalization of a husband or a parent; the rights incident to domicile; and the peculiar status of special classes, such as seamen, stowaways and natives of insular possessions. Further chapters (IV, V and VI) deal with the respective jurisdictions of the courts and the executive, with the matter of evidence, and with procedure for deportation.

On the score of utility, the book should prove of much value to all who may be affected by the practical operation of the immigration laws or concerned with their application. On broader grounds, the book is valuable in that it is a real contribution to a correct understanding of an important subject, expressing the fresh point of view of an acute mind, well informed, and uninfluenced by the preconceptions or considerations which may be supposed to affect the administrator on the one hand or the advocate on the other.

Respecting particular propositions advanced, or positions taken, by the author, the present writer prefers to make no comment. By way of general criticism, he would say no more than that the author's method leans so far toward the scientific as to seem at times somewhat artificial, and that his tendency to deduce general principles from rather scant materials, and then to press these principles to their logical conclusion in particular cases, savors occasionally of overstraining, in view of the essentially statutory origin of the laws in question and the full control of the subject possessed by the legislature.

CHARLES EARL.

Diplomatic Negotiations of American Naval Officers, 1778-1883. By Charles Oscar Paullin. (The Albert Shaw Lectures on Diplomatic History, 1911. Lectures on Naval History in the George Washington University.) [Of which fifteen are an analytical index.] Baltimore: The Johns Hopkins Press, 1912. pp. 380. Price \$2.00.

Dr. Paullin in this book treats of a subject too little known to the general public. It is confined, necessarily, to "negotiations," though such a limitation gives but a scant idea of the constant duties of the navy connected with diplomatic subjects. A mention of this, however, would not have been out of place in the preface.

Within the strict limits covered by the book, the subject is treated with Dr. Paullin's usual thoroughness and full knowledge of his subject. Naturally the first naval diplomat mentioned was that picturesque and, despite many short-comings, heroic character, John Paul Jones. The thirty-two pages devoted to this part of his subject are none too many and in this space Dr. Paullin has interwoven much information of Jones' many-sided life, made up as it was of strenuous effort abroad to add to the force under the American flag; of struggles with French, Dutch, Danish, and other authorities to help in one way and another the cause to which he was attached; of much flirting after the manner of his time,

and of much heroism. He was a great adventurer as well as a great naval officer, with broad and sound views of naval policy which, had he lived, might have saved to Napoleon, under whom he probably would have taken service, the fatality of Trafalgar. He died, however, in 1792 on the eve of leaving on a mission to Algiers, for which he was chosen by Jefferson, then our minister to France. Had he gone there, it is scarcely possible that we should ever have arranged to pay the tribute with which our history is stained, though it must be said that we only did what was done by all the others.

The early relations with the Barbary Powers receives adequate treatment, considering the space possible in seventy-nine pages. The struggle against their aggressions on our commerce, ended only in 1815, when Decatur, with a very considerable fleet, forced a treaty with Algiers, and thus shamed England into like action next year when a British fleet under Lord Exmouth bombarded Algiers and made a lasting end of Barbary pillage and captivity. It is somewhat unfortunate that Dr. Paullin was not able through its late appearance to give credit to the work of a French author, Monsieur E. Dupuy, whose book, *Americains et Barbaresques, 1776-1824*¹ only appearing in the year of Dr. Paullin's lectures, was too late for his use. It is, though by a foreigner, the most complete, satisfactory and withal the most appreciative history of the subject, the importance of which can hardly be exaggerated, as to our Barbary troubles was due the building of a new navy (that of the Revolution having entirely disappeared). It was, too, in the Barbary wars that the navy took form as well as substance. To Preble, Bainbridge, Decatur, Rodgers and their like are due the organization and discipline of this period which brought the great successes of the war of 1812, which redeemed us from the utter humiliation of the early disgraceful events which occurred ashore. And had the negotiations with the Barbary Powers been left wholly in the hands of naval officers, results would have been more satisfactory than they sometimes were.

The early relations with China, and the opening of Japan and Korea, with all of which, diplomatically, naval commanders had so much to do, are thoroughly and well treated, as also our early relations with the Sandwich Islands, the first treaty with which by any foreign Power was made by the commander of the U. S. S. *Peacock*, Thomas Apcatesby

¹ Etudes d'Histoire d'Amerique, *Americains et Barbaresques, 1776-1824*. Paris: R. Roger et F. Chernois, 99 Boulevard Raspail, 1910.

Jones, in 1826. Throughout the Pacific, American naval officers have always been active in forwarding our commercial relations and protecting our commerce.

As before mentioned, the rather strict adherence to purely diplomatic functions can give but a somewhat narrow idea of the intimate connections of the navy with diplomacy. It thus necessarily leaves aside such incidents as the Kotzka affair, so important in causing the crystallization of our rules regulating the status of foreigners naturalized in the United States; the seizure of the *Georgiana* and *Susan Loud* at the time of the second Lopez expedition to Cuba in 1850 (which might not illogically have been included, as Commodore Morris acted at this time as a special commissioner from the Department of State); the events at Greytown in 1882, which ended the filibustering of Walker in Nicaragua; the connection of the navy with the Barrundia affair, in which the administration erred and the naval commander, first censured, was later held to have been diplomatically correct; our difficulties with Chile in 1891; and the firm and bold action of Admiral Benham at Rio de Janeiro in January, 1894, which ended the Brazilian naval revolt. These are but examples of the many instances which, while not strictly diplomatic, as such action is in the regular course of duty, have still a very near relationship to diplomacy. The Navy Department in fact is a co-worker with the Department of State. As expressed by Mr. Edward J. Phelps, when minister to England, "The Navy is the right arm of Diplomacy." It is the *avant courier* in many questions; some settled offhand; others which may finally be settled in more prolonged negotiations by the State Department. How close this association is may be understood by a remark of Mr. John Hay, when Secretary of State, to the writer: "The naval officers have had many difficult diplomatic questions to deal with in Central America in the last two years, and I want to say that in no case have they ever gone wrong." The later activity of the navy in Central America is well known, and even as this is written (August 24, 1912), ships are again on their way to Nicaragua to take part in the attempt to settle difficulties.

Many volumes, however, would be necessary to deal with so extensive a subject as naval diplomacy in the broad sense, and Dr. Paullin was wise to keep within technical bounds. It is not amiss, finally, to say that though the navy is the great school of diplomacy and carries to successful conclusion so many diplomatic questions, a naval officer cannot now occupy a diplomatic post excepting by vacating his commis-

sion. Such a fact is not commendatory of the justice or good sense which underlies so extraordinary a law.

Dr. Paullin's book is in every way to be recommended as a study of its subject.

F. E. CHADWICK.

Les Questions actuelles de Politique étrangère en Europe. By F. Charmes, A. Leroy-Beaulieu, R. Millet, A. Ribot, A. Vandal, R. de Caix, R. Henry, G. Louis-Jaray, R. Pinon, and A. Tardieu. Paris: Felix Alcan. 1911. pp. 320, maps. Price 6 fr. 50.

This is the third and revised edition of a book originally published in 1907. It is the first of a series on contemporary historical and political problems resulting from conferences at the famous *Ecole Libre des Sciences Politiques* in Paris. The *avant-propos* contains the following interesting announcement:

"This first series of conferences held in 1907 has since then been repeated annually at the *Ecole Libre des Sciences Politiques*. This year [1911] we shall prepare our fifth series upon the present-day questions of foreign affairs in America."

The volume under consideration contains the results of five conferences dealing with the important subjects of English and of German foreign policy, the Austro-Hungarian and the Macedonian questions, and present-day Russia. Each conference consists of a careful study by some leading authority, followed by a brief *discours* on the part of some distinguished statesman or publicist. Naturally the solid *études* have more value and interest to the student than the more brilliant *discours*.

These studies aim at impartiality and appear to be remarkably free from national bias or partisanship, though they naturally reflect the French point of view, and French interests are placed frankly in the foreground. M. Robert de Caix gives the following characterization and summary of recent British policy (pp. 1 and 48):

"During the last quarter of a century, the foreign policy of England has passed from a great quietude to a crisis of imperialism and colonial appetite, and finally to a renewal of that care for European equilibrium which the English have shown several times in the seventeenth and eighteenth centuries, and at the beginning of the nineteenth century. . . . Such has been the foreign policy of England: To eliminate the difficulties between herself and such Powers as she might be able to unite

for the purpose of safe-guarding the equilibrium which, threatened by the progress and unmeasured aspirations of Germany, had begun to disturb her; and to unite herself with these Powers while uniting them with one another (*se rapprocher de ces puissances tout en les rapprocher les unes des autres*)."

M. Tardieu presents us with a brief but interesting study of recent German foreign policy from the French point of view. He is unquestionably right in characterizing this policy as largely a "personal" one during the reign of William II. Whether readers generally will agree with him that German intervention in Morocco was a mere pretext or that "Germany has struggled for supremacy and France for equilibrium" will depend mainly upon their pro-French or pro-German sympathies; but, however well-disposed toward Germany he may be, even the most impartial student must at times deplore her diplomatic aims and methods.

It is interesting to note the restraint with which M. Tardieu speaks of the possibility of maintaining "correct" relations between France and Germany.

In his comprehensive study of the Austro-Hungarian question, M. Louis-Jaray answers three questions. 1. Is the Austrian state threatened with spontaneous dissolution? 2. Is Austria-Hungary threatened with separation? 3. Is Austria-Hungary threatened with partition? These questions are all answered in the negative.

One of the most interesting of these studies is that on the Macedonian question by M. Pinon, who predicts, p. 215, that "little by little, like a ripe fruit, Macedonia may be detached from the Ottoman Empire, while remaining attached to her by a tie of vassalage. It would be the same evolution that has been undergone in the case of Roumelia and which is now in process of completion for Crete."

The Russian question is very ably discussed by MM. Henry and Leroy-Beaulieu. Both of these eminent publicists agree that the present absolutistic and bureaucratic system in Russia is doomed and that the agrarian problem bristles with difficulties. Both seem to believe in the ultimate possibility of a constitutional and parliamentary régime for Russia, but they apparently also believe in proceeding very slowly and cautiously. Both approach their subject in the spirit of liberal conservatism rather than in one of conservative liberalism. The views of that veteran student of Russia, Leroy-Beaulieu, are evidently somewhat biased by fears for the future of the Dual Alliance between France and

Russia, whose very existence might be endangered by the triumph of the radical or revolutionary forces in Russia. He even makes this danger the ground for an exhortation to moderation or conservatism in French politics. This bias on the part of a great publicist may serve to remind us of our good fortune in the United States in that we are not yoked together with any foreign Power, reactionary or otherwise, but are free to work out our own destiny.

A. S. HERSHEY.

Das Staatsrecht des Russischen Reiches. By Dr. W. Gribowski. (*Das öffentliche Recht der Gegenwart*, Band XVII.) Tübingen: Verlag von J. C. B. Mohr. 1912. pp. xi, 197.

For some time there has been a need for a really good text-book of Russian public law, which should make a knowledge of the development of public law, since the granting of the constitution, available to foreign students. The only reliable text-book, which is that written by Prof. Engelmann (in Marquardsen's *Handbuch*), was published in the eighties and is absolutely out of date; none of the Russian literature concerning Russian public law is as yet translated into any other European language. This is the more unfortunate because of the interesting peculiarities of Russian public law and the distinctive characteristics of the Russian scientific schools. One must remember that the scientific interpretation of Russian law has already been responsible for the publication of many dozens of volumes of analysis and criticism.

Thus one might await with considerable interest the volume of the great German edition *Das öffentliche Recht der Gegenwart* devoted to the public law of the Russian Empire. It has now finally appeared; unfortunately, however, it is bound to disappoint many a reader. First of all, it is much too short and deals with most of the questions in a too elementary way. Secondly, the most important controversial questions are carefully avoided by the author. Moreover, the volume makes on the reader a distinct impression that the author is not a specialist in the subject he treats. Prof. Gribowski has not specialized in constitutional law; he is an historian and not a lawyer, which fact necessarily shows in his work. Unfortunately, the historical aspect of the subject is almost entirely omitted by the author, though that is the part in which he could have done his best work. This is especially regrettable because the development of the public law of Russia can hardly be made intelligible unless it is explained and interpreted in connection with the historical

evolution of the country. This applies to Russia much more than to Germany or France. Take, for instance, the laws concerning the peasants and the nobility, the Russian Constitution or Manifesto of the 30th of October, 1905, as well as many parts of the administrative law, — all these questions and many others need a wide and detailed historical interpretation, which the author does not give.

Then, also, Prof. Gribowski united in his work two widely different branches of law, public and constitutional law proper and administrative law, which latter certainly should have received special attention and a quite different mode of treatment. It was utterly impossible for the author to treat satisfactorily both subjects in less than 200 pages without unduly curtailing them.

The contents of the volume is arranged according to the general plan of similar German text-books. First comes the theory of the Russian State. Prof. Gribowski gives in this chapter a short survey of the laws of 1905 and 1906 which make up the modern Russian Constitution; it is here however that all the difficult problems of the interpretation of Russian law are very carefully avoided, this notwithstanding the enormous amount of literature which has sprung up in Russia since 1905. The only excuse could be that a detailed treatment of these questions would take up much more space than the 8 pages devoted to them by the author.

Next comes a chapter treating with the Territory of the Russian Empire, and thirdly, the theories concerning the "Nation" (*Das Volk*). We find here the laws concerning the different classes of the Russian people, the nobility, the peasantry, etc., as well as the Russian theory of allegiance and the laws concerning the Jews, the Finns and foreigners. In these latter cases we have another example of the unfortunate shortness of the work. A scientist abroad, who might need data of the Russian law, concerning, for example, the Jews or foreigners, which, by the way, does happen so very often, — will feel greatly disappointed in finding that Prof. Gribowski gives so very little. The complicated question of the laws concerning the Jews is treated in less than *one* page (this might really seem incredible).

In the next chapter (*Staatsgewalt*) the reader will find paragraphs treating of the position of the Monarch and the Parliament (the Duma and the Council of the Empire), as well as with the laws dealing with the Russian franchise.

Chapter VI is devoted to the question of the theory of law, as distin-

guished from an administrative order. The theory of Prof. Gribowski is based on the theory generally accepted in Germany, making a formal distinction between Gesetz and Verordnung. This is, on the whole, quite acceptable for Russian law.

Chapter VII deals with the system of the organs of the executive power, the ministers, for example. Prof. Gribowski follows here, too, the generally accepted German system. First he gives an enumeration of the central organization, the Senate, the Synod (for the Church) and the ministries; secondly come the local authorities of the government, for instance, the governors and governors-general, and, finally, the self-governing institutions, the Zemstros and the municipalities.

The next chapter deals with the Russian judicial system and the different courts of law. Chapter IX deals with the civil service, which constitutes a very important and interesting part of Russian public law, and Chapter X with the laws concerning the responsibility of government officials. Unfortunately, this last important question is also dealt with in a too perfunctory way, occupying only some three pages.

Finally, the last chapter is devoted to the different branches of the administration, the finances, labor legislation, the police, etc.

The language of the German translation is by no means faultless, which also is a serious impediment for foreigners who are not well acquainted with Russian law or Russian life. The volume thus is good only for short references and general ideas about the public law of Russia, and stands below the other volumes of the *Öffentliches Recht der Gegenwart*, which fact cannot but be deplored by Russian lawyers.

BARON S. A. KORFF.

Das Staatsrecht des grossfürstentums Finnland. By Dr. R. Erich. (Das öffentliche Recht der Gegenwart, Band XVIII.) Tübingen: Verlag von J. C. B. Mohr. 1912. pp. xi, 243.

The second volume of the *Öffentliches Recht der Gegenwart*, dealing with the public law of Finland, was also awaited with impatience, as the previously published work of Senator Mechelin (in Marquardsen's *Handbuch*), dating from the eighties, was thoroughly out of date. The public law of Finland, that very small part of the Russian Empire, received a more attentive and a more cautious treatment than the public law of Russia proper, as the author specializes in the domain of constitutional law.

The system of the volume is, in the main, the same as that of Volume XVII. First comes a short historical introduction, which also is far too short. Then come the chapters dealing with the Territory of the Grand Duchy and its people (the different social classes, the foreigners, the theory of allegiance, etc.). The next chapters are devoted to the government organization. The author, first, deals with the Monarch, then with the central organization, the governor-general, the Senate and Minister for Finland; thirdly, comes a chapter devoted to the Single Chamber or Diet of Finland, which is noted throughout the world for the fact that women in Finland not only have the vote, but actually sit as members of the Diet, since the reform of 1906; thus Finland is generally cited as an example by the suffragists of different countries.

In the next chapter Prof. Erich deals with the general system of the organs, the administration, as well as the courts of law. This must be considered as the main defect of the work; it is a great pity that the author did not separate the organs of the administration from the judicial system and did not treat them apart from one another.

Prof. Erich pays much more attention to the theory of distinction between laws and administrative orders than Prof. Gribowski, devoting to it about 30 pages. This is due unquestionably to the fact that the Finnish law concerning administration is very complicated; the difficulties of its interpretation are multiplied on account of the lack of codification.

The fifth section (Abschnitt) of the volume is devoted to the different branches of the administration, the finances, the police, the schools and university, etc.

Finally, in a short concluding chapter, Prof. Erich gives the reader the Finnish theory of their country's autonomy and of Finland's relations to the Russian Empire. The author takes the view of the Finns, according to which Finland is a semi-independent state.

In comparing these views of Prof. Erich with that which Prof. Gribowski has to say about the same question, the reader will have a vivid picture of the great conflict which has arisen lately between the ideals of the Finnish people and those of the Russian Government. Prof. Erich expounds the Finnish theories, while Prof. Gribowski gives us the views of the Russian Government.

BARON S. A. KORFF.

Urkunden zur Geschichte des Völkerrechts. By Dr. Karl Strupp. 2 Bände. Band I: Bis zum Berliner Kongress (1878). Mit einer Karte, pp. xviii, 410; Band II: Vom Berliner Kongress bis 1911. Mit einer Karte, pp. viii, 539. *Erganzungsheft*, pp. viii, 106. Gotha: Friedrich Andreas Perthes A. G. 1911, 1912.

Dr. Strupp, whose little collection of international incidents or cases evidenced a familiarity with the theory and practice of international law¹ shows, in the present collection of international documents, not merely a grasp of the general principles of international law and of the treaties and conventions in which they are in part imbedded, but also a first hand knowledge of international law in its historical development. What his hands have cunningly gathered together and grouped under appropriate headings, he shares with any and every reader minded to draw upon his stores of material, and shows him not so much what international law is, as how it has become what it is, namely, a universal law scaling or circumventing national boundaries as if they were non-existent things.

It is natural, therefore, that Dr. Strupp arranges his material chronologically, for only in this way can the growth of international development be shown.

For the early periods this method is satisfactory, as the agreements were eminently political. Within the last century, however, a variety of subjects have been the object of regulation, control and protection by treaties to which many, in some cases all, civilized nations have been parties. Chronology is important in such cases as fixing the dates at which peoples and their governments consciously or unconsciously legislated in the interest of the international community, instead of solely in their own individual interests. In this latter period, therefore, Dr. Strupp groups material of a related kind under appropriate headings, but wisely arranges the treaties within the groups according to their dates. In this way the march of events is shown chronologically in matters political; and international development and organization are shown by topical arrangement. The student—for these volumes are primarily for him, although the general reader would find them interesting and men in public life serviceable—is thus enabled with little labor to appreciate the factors of international progress, to mark their first or gradual appearance and to gauge their force and influence.

¹ See favorable review of Dr. Strupp's *Völkerrechtliche Fälle* in Vol. 5, pp. 127, 128 of this JOURNAL.

Dr. Strupp's first period runs to and includes the Peace of Westphalia in 1648. The material portion of seven documents is printed in this section: a commercial treaty between Rome and Carthage concluded some four hundred years before Christ (Vol. I, pp. 1-2); the famous armistice of 423 between Athens and Sparta (Vol. I, pp. 2-3) with its arbitral clause; the alliance two years later between the same countries (Vol. I, pp. 3-4); the agreement of 1177 by which Ferrara opened the Po to navigation (*Consules Ferrariæ juraverunt aperire aquam Padi libere omnibus hominibus, et apertam omnibus hominibus eam tenere, nec ullo tempore eam claudere, et hoc observare bona fide et sine fraude ulla.* * * * Vol. I, p. 4); the Treaty of Tordesillas of June 3, 1494 by which Spain and Portugal modified the Pope's mediation of 1493 and agreed that Spain should possess all its discoveries 370 miles west of a line from pole to pole passing through the Cape Verde Islands and that Portugal should possess all its discoveries to the east thereof (Vol. I, pp. 5-11); the first capitulation of 1535 between France and Turkey (Vol. I, pp. 11-16); and finally the most important provisions of the treaties of Osnabrück and Münster which taken together make up the Treaty of Westphalia of 1648 (Vol. I, pp. 16-23, Vol. II, q. v. for the famous guarantee clause).

It will be observed that these documents do not relate to a single subject, but deal with matters of genuine importance. It is a sad commentary upon the statesmanship of the two thousand years and more covered by this section, that of the treaties and conventions negotiated, often after the bitterest of wars, a competent scholar saves from the wreck some twenty-three pages as essential to the student of to-day.

The second period runs from the Treaty of Westphalia (1648) to the second Treaty of Paris (1815), including the most important provisions of the Congress of Vienna. Here again the treaties are of a political nature and this political activity of the nations continues to characterize the treaties concluded to the year of the Congress of Paris (1856). From this date the treaties cover a broader field covering in more or less detail and with varying success the problems of mutual coöperation and international organization. Dr. Strupp does not, however, end his third period with the Congress of Paris but with the Congress of Berlin (1878). The fourth and last period extends from the Congress of Berlin to 1911, the year of publication. With the third period, however, from 1815 to 1878, the topical classification, which is such a marked and useful feature of Dr. Strupp's collection, makes its appearance alongside of purely

political agreements. The second period (1648-1815) contains the important political treaties chronologically arranged (pp. 24-171). Important political questions of the third period (1815-78) are: President Monroe's message of December 2, 1823, which formulated the so-called Monroe Doctrine (pp. 175-177), with President Roosevelt's statement of it of December 3, 1901, in a footnote (p. 177); the oriental questions: Greece (pp. 178-223); Egypt (pp. 225-228); the German Bund including the Schleswig-Holstein question (pp. 228-242); the end of the German Bund (pp. 242-250); the Franco-German war (pp. 250-265). The fifth section deals with various political questions, such as the development of Belgium (pp. 265-271) and the Italian question (pp. 271-278).

The remaining documents of this period (1815-1878) deal with economic questions (river, canal and navigation, pp. 279-320); questions of intercourse and communication (the Gotthard tunnel, the universal postal union, the telegraphic union, pp. 320-345); questions of emigration (so-called Bancroft treaties, pp. 345-346); tariff and commercial policy (pp. 347-374); questions of international justice and administration: extradition, pp. 374ff.; the regulation of ideal (ideeler) interests: repression of the slave traffic (pp. 392-400); regulation of public health (pp. 400-401); scientific interests (pp. 401-403); laws of war: the Paris Declaration of 1856 (pp. 403-404); arbitration: Treaty of Washington of May 8, 1871, and the Alabama award of September 14, 1872 (pp. 405-410).

The period from 1815 to 1878 has been chosen as the best fitted to show Dr. Strupp's happy combination of the chronological and topical method, as in this period non-political treaties first appear, assume importance and begin to outnumber arrangements of a more or less political character. The subdivisions in the final period of 1878 to 1912 correspond to those in the preceding period except that the previous section of documents concerning justice and administration is replaced by one entitled, "International, private, precedural and administrative law." The entries are however more numerous and of greater interest to the general reader as well as student. From these various documents a few are singled out as of special interest: the oriental question, including the settlement of the Bulgarian question by the recognition of Bulgarian independence by the interested Powers (Vol. II, pp. 6-18; the Bosnia-Herzegovinan question (Vol. II, pp. 24-32); the Moroccan question from 1880 to 1911 (Vol. II, pp. 40-71, supplemental volume, pp. 1-26); the Far Eastern questions from 1893 to 1910 (Vol. II, pp. 123-154,

306-312); the various treaties guaranteeing Norway, the Baltic Sea territories, etc. (Vol. II, pp. 196-198); Suez and Panama Canal agreements (Vol. II, pp. 198-210); the Geneva Red Cross Convention of 1906, the documents of the Second Hague Peace Conference and the Declaration of London of 1909 (Vol. II, pp. 412-507).

The supplemental volume of 1912 contains the documents relating the Morocco controversy between France and Germany and a very complete collection of documents concerning the Turco-Italian war in Tripoli (pp. 29-92) as well as the arbitration treaties of August 3, 1911 between the United States, France and Great Britain, and the still more recent arbitration treaty of August 9, 1911, between France and Denmark (pp. 93-103).

This brief summary of the contents of Dr. Strupp's three volumes shows, it is believed, their great value and usefulness, and it is no exaggeration to say that they place before the public material indispensable to a correct understanding of the international development which has slowly taken place in the past and which is rapidly unfolding itself before our very eyes. We would be indebted to the learned editor if he had contented himself with relating and classifying this material under appropriate headings. But he was not content to do this. He has shown the position of each document in international law and international development by a series of carefully chosen references to standard works of international law and special monographs dealing in greater detail with the questions regulated or raised by the treaties and conventions. The student is therefore enabled to pursue his studies until he has mastered the various subjects to which the documents relate. Marginal notes make it possible to see at a glance the topic treated, and the use of different type calls attention to important provisions. Only material portions of the documents are printed and omissions are indicated. The language of the originals is preserved, if it is generally understood. When this is not the case, translations are used.

Lists of important collections of treaties and works of international law, as well as a chronological list of the documents, are prefixed and an index is appended to the second volume. A map of the Balkan peninsula ends the first volume; a map of Northern and Central Asia accompanies the second volume.

It will perhaps interest the American reader to note that Dr. Strupp considers as servitudes the French and American treaty rights in Newfoundland waters, created by the Treaty of Utrecht and its successors

as far as France was concerned (Vol. I, pp. 33-34), and by the Treaty of 1783 as regards the United States (pp. 81-82). There is evidently no doubt in his mind as to the nature of the right for he uses not merely the term "Fischereigerechtigkeit" but "servitut." The arbitral award of 1910 has evidently not eliminated the servitude from international law.

The work is a distinct contribution to the understanding of international relations, and students without distinction of nationality are indebted to Dr. Strupp for this intelligent, painstaking and carefully annotated collection of the most important documents dealing with international law and international organization.

JAMES BROWN SCOTT.

Nationalities and Subject Races. Report of Conference Held in Caxton Hall, Westminster, June 28-30, 1910. London: P. S. King & Son. pp. xii, 178.

The conference, whose proceedings are recorded in this volume, was held in London in June, 1910, "to define and assist the rights of subject nationalities, and to introduce into international politics the principle recognized in private life, that it is the duty of the strong to protect, and to help the progress of the weaker and younger communities towards maturity." Its keynote was the principle of nationality — the right of each nation or people to the management of its own internal affairs, and its protection from oppression and exploitation. Its participants probed to its roots what one of them described as "the canker of modern civilization." Among them were native representatives of Egypt, Finland, Georgia, India, Ireland, Morocco, Persia and Poland. The conference was the forerunner of the First Universal Races Congress held in London in the summer of 1911. At the final session, Mr. J. A. Hobson, presiding, summarized the recital of the difficulties and the wrongs of the subject races, and re-stated the problem under consideration in a manner so clear, so succinct and so satirical, that we cannot do better than to quote from his address:

Every problem of conduct, whether on the individual or national scale, if it is a difficult problem, implies a certain contradiction between professions and practices, that is to say, an inconsistency between what we think we mean and say and what we really mean and actually do. Now this problem in a sense is a modern problem. It did not arise in the Imperialism of the ancient world in any clear shape whatever. The old Imperialistic nations knew very well what they were doing, and they made no bones about it. If they went out to loot any territory they said so, and their

armies executed the behests of those who planned this policy. They went for gold or they went for slaves or for trade or for glory or for extension of territory, and they knew what they were doing and meant to do it.

Now, in comparatively modern times a change took place in the attitude of the dominant nations towards these acts of aggression. They came to consider that it was more respectable to put a certain gloss upon their motives. This was not an invention of the present age. You find it in the Spanish Imperialism of centuries ago, when that most Christian nation set out to Christianize the lower nations, taking from them all the treasures they might happen to possess. But we get the full-blown inconsistency in recent times. Imperialistic nations now — nations who wish to fasten dominion upon weaker people, or to hold down territories which contain upon them true nationalities unable to sustain themselves against the forces of dominant power — such people allege — and, mind you, allege with what appears to them very often to be the truth — other motives than those which are actually driving them along their line of conduct. They say, and their spokesmen often think, that what they are really concerned with primarily, if not entirely, is the good order of civilization. They find certain peoples in a disturbed condition upon their frontiers, they find certain rulers of nefarious character and of destructive habits, they find a Premeh, a Theebaw, a Mahdi, or a Mullah, whom they term mad, they find, or try to find, some evil person of this character who is representative of a degraded and injurious civilization upon their frontiers, and they go into the country with force in order that they may restore good order for the benefit of the people of that country and of the civilized world.

Sometimes conjoined with or substituted for this motive is another. The resources of certain parts of the world are developing; it is desirable from the standpoint of the interests of the wealth of the world that whatever natural resources there may be in any part of the world, although these resources may be under the nominal dominion of another people, it is desirable that they should be developed, and if the people are so backward and so ignorant or so obstinate that they refuse to develop them, then it is the business, even the duty, of the nearest powerful neighbor to step in and undertake to teach them how to do the duty they neglected. Along with that there is another plea, doubtless urged with perfect genuineness by most of those who use it: a desire to spread the general moral good of civilization among the backward people of the earth — that the nation which is advanced in civilization shall reach out a helping hand to elevate the lower peoples and to teach them western science, western morals, and western manners, and lead them along the path to true self-government. These are the professions; and I want to say this to you, that I think they are professions genuinely held by many people who maintain them.

* * * * *

Now, you see, you have these professions graded in three forms. The widest profession purports that the control of the subject races is undertaken on behalf of the good of the civilized world; secondly, that it is undertaken on behalf of the good of the subject people; and, thirdly, that some incidental gain and advantage may come to the people who undertake this pious duty. Now I need not argue to you what the practice is; I have stated the theory or the professions; these three motives may all be present in the actual relations of a dominant over a subject race; but they are present in a different order and in a different proportion from that which is contained

in the professions—the third of these motives is substituted for the first and the second and certainly takes a prior importance in the play of history. So far as we are able faithfully to interpret the course of Imperialism, in modern times we can find several not wholly distinct, but still fairly separate, motives at work. The first is that which was a dominant motive in all times when people sought empire, the desire to exploit in some shape or other the backward or inferior race. That exploitation takes a different shape in modern times. We do not find it good for ourselves or for anybody crudely to draw masses of wealth in the shape of taxation from that subject race. We find it better generally to put ourselves upon a basis of sound trading policy with these people, and to take our gains from the forms of international exchange. Still more important, we plant upon these nations and their territories the spare capital which more and more seeks investment out of our own country; and, from my standpoint, this is the most powerful single motive making for the modern policy of Imperialism—the desire to extend the effective and profitable area of investment by getting hold of and developing the territories which belong to other people, and using the labor power of those lower people to assist us in grinding out dividends and profits for those investments. Along with that we find the more subtle desire of politicians and important people in general for territorial and political aggrandizement for themselves, for their class, and for their own native country. This is the way in which so-called patriotism comes in as a motive to Imperial aggression. There is a third motive, however, which I would distinguish, and that is the desire, the increasing desire in modern times, to find effective, lucrative, and interesting careers for the men who want to go out of their own country, for the benefit of their country, or for the benefit of themselves, and carve out careers in distant countries. This, I say, is not entirely a new motive. James Mill, I think, it was who described the British Colonial system of his time as ‘a gigantic system of out-relief for the sons of the wealthy classes.’

Of the many forcible pleas made to the conference for justice to the subject races, the most striking was by Lala Lajpat Rai, a distinguished member of the bar of India—the most striking because of the terrible picture it presents of the conditions now existing in India, after a period of one hundred and fifty years under the dominance of the overlord nation, which is generally recognized as the most humane and liberal of all in its treatment of subject races. It was the general impression that when the liberal party gained parliamentary control in England, and undertook, in 1908, under the guidance of Lord Morley, to revise and reform the government of India, it would succeed in working out a scheme under which many of the grievances of the natives would be remedied, and the chronic unrest, which had so long disturbed the administration of India, would disappear. This native lawyer gave a recital of events under the existing law, which justifies the statement that the last condition of India is even worse than that which preceded it. Much was hoped for from the addition of a native Indian to the three

Executive Councils of Bengal, Bombay, and Madras; but the appointments made were not of a character to in any way change or mitigate the situation; and Lord Morley's scheme for democratizing the provincial councils, as it finally worked out and is revealed in actual operation, is denounced as the most mischievous that could be conceived in the present state of Indian politics. The finances, the military and education all remain wholly outside the scope of the provincial councils. The Indian press, both vernacular and Anglo-vernacular, finds itself under a system of surveillance and arbitrary suppression never previously known. The right to hold public meetings for the discussion of political grievances is withdrawn. Condign and brutal punishment for political offenses is common. So also is trial without jury in high courts, without the right to appear by counsel. A wide and disciplinary system of house-searching exists. Free primary education is denied. A condition of bitter hostility has been generated between the landed interests and the educated classes. The entire police system has become inefficient and utterly corrupt. The last, but not the least, of the native grievances is, "that the system of government in India is sapping our manhood, driving virtue out of the land, and making patriotism and public spirit a crime." Here is a terrible picture of the failure of England in India; and the reader of the news reports from that country, which appear in the British press, cannot resist the conviction that in its essential features the indictment is true.

No less sad and discouraging are the accounts of the local situation presented to the London Conference from Finland, Egypt, Morocco, Georgia, and other subject countries; and a perusal of this volume almost leads one to the conclusion that John Stuart Mill was right in his famous dictum: "Such a thing as the government of one people by another cannot and does not exist. One people may keep another as a warren or preserve, for its own use, a place to make money in, a human farm to be worked for the profit of its own inhabitants." At least the members of this conference believed it to be true; and we conclude our notice of this interesting volume by quoting the resolution it unanimously adopted at its close:

That the preservation and revival of national liberties and characteristics make for the enrichment of civilization; that the claim of any subject people of distinct nationality to the management of its own affairs should be recognized by the dominant power; and an International Tribunal should be established to take cognizance of violation of all treaties, conventions, and agreements, between great Powers and small or subject nationalities.

S. N. D. NORTH.

Handbook of International Law (Hornbook Series). By George Grafton Wilson. St. Paul, Minn.: West Publishing Company. 1910. pp. xxiii, 623.

The author of this handbook has long been known to students of international law as one of the authors of Wilson and Tucker's *International Law*, a text-book which has gone through several editions. The present volume resembles in general arrangement and style the last edition of Wilson and Tucker, though the introductory matter on the nature and historical development of international law has been largely omitted and other chapters expanded. Wilson's classification and arrangement are clear, logical, and on the whole admirable.

The rapid development of international law since the meeting of the First Hague Conference in 1899 has rendered large parts of existing text-books obsolete. The present volume embodies fully the results of recent conventional changes and is in all respects fully abreast of the times. It contains copious extracts from the Hague Conventions of 1907, the Declaration of London of 1909, and other recent international agreements, the full texts of which are given in the appendices. The reader may be inclined at first sight to criticise the adoption in the text of so many provisions from recent conventions, the status of which is still a matter of uncertainty, but a closer examination will show that Professor Wilson has put in the text only those provisions on which a large number of Powers are agreed. Still the status of the conventions given in the appendices is nowhere defined and the student may sometimes question how far some of the provisions quoted in the text are binding. General treaties and conventions constitute at present the most active source of international law, but very few of these international agreements have been signed by all of the Powers. The student therefore is naturally perplexed to know what is and what is not international law. The only light the author throws on this subject is the statement (p. 11) that, "Where a considerable number of states are parties to an agreement, as to the Convention for the Pacific Settlement of International Disputes, signed at The Hague, October 18, 1907, such a convention becomes in effect international law for the signatory states." It must be confessed that this is rather an unsatisfactory basis on which to rest a system of law. And yet the author has discarded almost entirely the ethical and historical bases on which the older treatises were founded and has undertaken to base his work on concrete

statements of existing rules derived largely from recent treaties and conventions. It should be said, however, that these shortcomings are due to the changing condition of international law rather than to the method employed by the author. It may well be doubted whether the time is ripe for a new *treatise*. While the present volume does not rise to the dignity of a treatise in the older sense, it is clear, concise, logical, and accurate. It was designed as a practical text-book for law students, and as such it is excellent. I know of no other book which puts before the student in such concrete form the existing rules of international law.

JOHN HOLLADAY LATANÉ.

The Turco-Italian War and its Problems. With Appendices containing the chief state papers bearing on the subject. By Sir Thomas Barclay. With an additional chapter on Moslem feeling by the Rt. Hon. Aymeer Ali, P. C. London: Constable and Company, Ltd. 1912. pp. xiii, 259.

Italy declared war against Turkey on September 29, 1911, and within two months thereafter this capital little book of Sir Thomas was in press. The preface is dated December, 1911. This means, of course, that the monograph includes nothing of a later date. This is not, however, a drawback, as the purpose of the study is to examine the conduct of Italy in the light of past policy, and of the official correspondence that passed between Italy and Turkey in the month of September. If hitherto unknown documents may put a better face on Italy's action, for the present we are justified in relying upon the Italian ultimatum of September 26, 1911, the Italian declaration of war of the 29th, and the Turkish reply of the 29th to the ultimatum of the 26th, for the official reasons of the war, and in a lesser degree we may take into consideration the semi-official Italian and Turkish statements of their respective cases which appeared in the *London Times* the day following the declaration of war on the 29th. These various documents are printed in chronological order (pp. 109-113) in the first appendix, and place the reader in possession of such facts as the two governments have been minded to lay before the public.

In the ultimatum, Italy asserts that "the state of disorder and neglect in which Tripoli and Cyrenaica are left by Turkey should come to an end, and that these regions should be allowed to enjoy the same progress as that attained by other ports of Northern Africa," that this transformation is, "so far as Italy is concerned, a vital interest of the very first

order, by reason of the small distance separating these countries from the coasts of Italy;" that "all enterprises on the part of Italians, in the aforesaid regions, constantly encounter a systematic opposition of the most obstinate and unwarranted kind."

In regard to the first grievance, no foundation is laid for the claim of Italy to pass upon the economic or social status of the provinces, and the small distance between them and Italy seems a slender basis upon which to rest the right of intervention, unless international law permits a neighbor to suggest without proving the existence of a nuisance and then to abate it at its will and pleasure. The assertion of a vital interest in the provinces is a general statement of a kind to appeal to the public at large, serves as a warning to the Powers that the dispute is not arbitrable and to discount in advance good offices and mediation.

Passing to the special charge, namely, Turkey's opposition to "all enterprises on the part of the Italians," it should also be said that this specification is over-general. It may be that Turkey was opposed to the increase of Italian influence in the provinces, and the present action of Italy justifies the Porte's fears, if the charge were really true. Then again it may well be that some of the Italian projects were of a kind not to be granted without seriously affecting Turkish sovereignty. In the absence of a specific enumeration of them, one cannot venture a positive opinion. The truth of the matter seems to be, as Sir Thomas clearly intimates, that Italy looked upon Tripoli as marked out for Italian acquisition and that the Italian Government took advantage of the Moroccan situation to pluck the fruit that Italian statesmen and politicians had watched with watering mouths. The tree was shaken, the plum fell and the taste is apparently sweet. The world at large is shocked at the whole performance on the part of a Power that has made the arbitration of international differences a cardinal policy — as far as others are concerned. There is a touch of the Adam in all of us, we always insist that others arbitrate; when our own interests are involved, arbitration is seen to have limitations and to be dangerous or inapplicable.

The annexation of Tripoli is a *fait accompli*, to use an expression dear to the diplomatic world, and cannot be undone. Compensation may be offered Turkey, and Sir Thomas shows how the question could be submitted to mediation; the annexation recognized and an indemnity, not less than five million pounds sterling, be assessed by the International Court of Arbitration at The Hague (pp. vi-viii). In municipal law the property would be returned to the owner; in international law, the *status*

quo created by the irresistible aggressor is recognized, and an indemnity, that may or may not amount to a fair purchase price, is forced upon the unwilling vendor.

In the practice of nations, it is still a misfortune, if not actually an indictable crime, to be physically weak.

Sir Thomas writes in fulness of knowledge and with an open mind, willing to believe that there may be some future justification for Italy's conduct, but seeing none sufficient at present. The additional chapter on Moslem feeling (pp. 101-108) shows how unjustifiable attacks on Turkey may easily produce the worst of all human calamities: a religious or holy war. The monograph is a consolation to those who believe that the municipal standard of honorable conduct should be applied to international relations.

JAMES BROWN SCOTT.

L'Arte della Pace. By Michele Asmundo. Catania: L. & S. Scuderi. 1912. pp. 255. L. 4.

The "Art of Peace," in the terminology adopted or invented by Mr. Asmundo, represents diplomacy, and the greater part of this little book consists of a summary sketch of the progress of diplomacy as a counterpoise of war in the relations of European states, from its origin in Italian politics of the middle ages to the present date. As a concise, clear and flowing narrative, it is admirable, and would be tolerably well adapted to serve as a primer covering general international relations during the period mentioned, in one of the encyclopædic series put out by various publishing houses. In this respect, the only criticism to be made arises from the very quality of conciseness commended, which sometimes suggests inaccuracy or incompleteness, where it is really a question of language or of theory undeveloped for lack of space.

It is from a wider point of view, however, that this part of Mr. Asmundo's work is open to remark, and the criticism suggested is this, that it is questionable whether he has, in his narrative, preserved sufficient relief to bring out clearly the real object and meaning of the book.

It must be confessed that we have something of a sense of losing the thread and of flitting down through the centuries among wars, conferences, treaties and new wars, in all of which the art of peace, as a determining factor, has but little chance of being remembered.

It is to the earlier pages that we must turn to find what the author

would regard as his contribution to science and theory. It consists in a presentment of the facts of political life as a balancing of forces.

The ultimate basis of the argument is found in the principle of the Malthusian law of the disproportionate increase of population and of means of subsistence. The productive surface of the earth is limited in extent, the possible multiplication of population is unlimited: it is war which reestablishes the relation between population and means of subsistence, not, be it observed, by the simple and straightforward elimination of the surplus population, but "by compelling men to limit their increase so as to adapt themselves to the means of subsistence."

War, we are told, results in conquest, conquest produces the state, and property within the state. "The earth is distributed amongst men who, compelled to live in the section of territory assigned to them, feel first of all the necessity of limiting their multiplication — hence the family."

War, therefore, is the origin of all civilization: but the idea of war is not to be separated from that of peace. They are in fact inseparable, but one or the other may prevail in human relations, or they may balance each other. In case of a perfect equilibrium, we have justice.

The force of war tends to destroy, the force of peace to preserve; but these two apparently contrary tendencies are inextricably associated. At no time, for example, is the economic value of human life so clearly emphasized as in war; numbers, organization, and mutual dependence then become of the highest importance.

The arms by which the force of peace is above all supported and developed, especially in modern times, are money and credit. The influence of the bourse may tend to peace or war, but it is essentially a power in favor of peace.

At this point, we meet with a curious attempt to represent the conceptions with which the writer is dealing, geometrically and by diagrams. A line running in one direction from a point represents the force of war, a line in the opposite direction, the force of peace. If these forces are precisely equal, a composite force arises which is called justice. The common point where all these forces meet in the diagram is law.

This section is interesting because it reveals plainly the nature of the author's ideas and, in a general way, the kind of value which the book possesses. All this, as to opposing and composite forces, is pure symbolism, just as the whole outline of the origination of property and the family is pure mythology.

That is not to say that it is necessarily without value in presenting a

fresh aspect of the subject; nor is the mythological element at all uncommon in the philosophy of law or politics. Rousseau's "Social Contract," essentially a piece of mythology, has been both fruitful and useful. What is uncommon is rather the simple clearness of style and language that make this element evident beyond question under a historical disguise.

The remainder of the book is occupied by the historical summary above referred to, and we can only repeat the criticism already indicated, that it would seem as if the ideas set forth, the economic forces making for peace and war, and often for peace even in the midst of war, the occasional equilibrium of the two forces in a state of justice and the causes which lead to a readjustment of the balance, while they may all no doubt be *illustrated* from the narrative, are often apt to be lost from view in its even flow.

As to the conceptions presented, much might be said. But, when we are told, as in the last few pages, that war is a law of nature, the originator of civilization and the condition of life, and we are solemnly warned against thinking of disarmament or universal peace, it suggests a treatise directed against lightning-rods on the ground that electricity is one of the most beneficent forces in nature, or against the construction of levees and breakwaters, on the ground that floods have in the past been a potent means of fertilization, besides furthering the progress of the world, from time to time, since the days of Noah, by removing large numbers of superfluous people from the face of the earth.

JAMES BARCLAY.

International Law. By L. Oppenheim. Vol. 1, Peace. New York: Longmans, Green and Co. 1912.

Professor Oppenheim needs no introduction to American readers. The first edition of his work, published in 1905-1906, has been a familiar manual of reference not only for students, for whom the author says that the work is particularly intended, but for advanced scholars and professors as well. The author admits that upon the publication of the first edition of the work he had received warnings that a comprehensive treatise in two volumes would never be read by young students. If the event has proved those warnings unfounded, we think it largely due to the fact that in the discussion of even the most complicated problems of international law the author has succeeded in giving the proper

historical setting to each question, with the result that the principle involved is more easily discernible.

Chapters I and II of the first volume deal with the foundation of international law and with the development and science of international law; and they are perhaps the most valuable chapters of this volume. The author's discussion of the legal force of international law is a careful and logical piece of argument, and is especially useful to the student for the distinction which it makes between the theoretical and practical aspects of the question. If Austin's definition of law be correct, then indeed what is called international law cannot be said to be law; but Austin has yet to prove that his narrow conception of law is the only one which may legitimately bear the title of law. But putting definitions aside (and with them the theories whose validity depends upon them) we find an actually existing body of rules which in practice are recognized as law, and which, though violated at times, as are the rules of municipal law, are in general enforced both by the moral sanction of public opinion and by the physical sanction of self-help, assisted occasionally by the intervention of sympathizing states.

Professor Oppenheim is a positivist, that is, he finds the source of international law in custom and treaties, which express the implicit and explicit consent of nations. We do not think it fair however to infer that the author is indifferent as to the moral forces underlying the actual practices of nations and directing the conduct of nations along more humane and just lines. In fact, in speaking of the work of Grotius, Professor Oppenheim pays a proper tribute to the influence exerted by the law of nature upon the development of modern international law.

The final chapter of the volume, which deals with important groups of treaties, will be especially valuable to students. The section of Commercial Treaties is new, and it is followed by a section describing Unions Concerning Common Non-Political Interests. This last section, dealing as it does with matters which lie outside the range of governmental policy and upon which it is easier, therefore, for nations to come to an agreement, illustrates in a striking way the rapid growth in recent years of a mutual recognition by nations of the many interests which they have in common, and offers no small promise of the probability in the future of similar agreements in which states will yield on minor questions of national policy in favor of a greater gain to the family of nations as a whole.

CHARLES G. FENWICK.

La Réglementation de la guerre des airs. By Baron L. de Stael-Holstein.
The Hague: Martinus Nijhoff. 1911. pp. 80.

This brochure is one of the class of publications so frequently found in Europe wherein the author takes up and elaborates a single subject, tentatively or exhaustively, according to temperament. It was Baron de Stael-Holstein's choice to make his study historically descriptive rather than legally analytic, a choice fortunate in proportion as the reader is without knowledge of the development of aircraft and of the current problems of international law. The brochure to most readers of the JOURNAL would therefore be "light" reading; to a larger and less specialized public, to whom it is undoubtedly addressed, it should prove valuable reading.

Baron de Stael-Holstein has, without being technical, covered the field indicated by his title, dividing his subject into three parts, early, present and future regulation of aerial war. As annexes, there are some ten pages of texts of projects or opinions relating to the subject, so that the brochure brings within a single cover the material on aerial war at present available. In the line of early regulation articles, relating chiefly to espionage, are cited from the Lieber code, the Declaration of St. Petersburg, the Brussels Conference of 1874 and the First Hague Conference. There is also quoted Bismarck's opinion relative to the treatment of balloonists at the siege of Paris. Present regulation is devoted wholly to a discussion of the action of the Second Hague Conference, while future regulation discusses primarily the questions now on the order of the day of the Interparliamentary Union. The excellent articles of the Fauchille code presented to the Institute of International Law at Madrid in 1911 are printed in an appendix, but not discussed to any extent.

In his fore-word, Baron de Stael-Holstein gives as his purpose in publishing the brochure the desire to make the material on the subject available to the next meeting of the Interparliamentary Union, which is avowedly a peace organization. This purpose may account for, but in the opinion of the reviewer it does not justify, the conclusions of the author, who occupies several of his later pages with regrets that aerial warfare was not prohibited before it was possible. Subscribing to that opinion is, unfortunately, impractical for the controlling reason that no state is willing to tie its hands in a field whose bounds are unknown. It is regrettable that there is so much human nature in the world, but it is

a fact that since the development of aviation in the past few years the ratifications of the 1907 Hague declaration on aircraft have ceased. Only 13 states have ratified the document, which was signed by 27 out of 44. It is not within human nature, or selfishness, to sign away advantages it may possess. The best argument against the use of bombs from aircraft is the fact that no present explosive is really effective when merely hurled from above. In Tripoli the Italians gave up hurling bombs at the Turks when they found they did not explode and that the Turks loaded them into cannon and shot them into the Italian lines, where they did do damage. The reviewer believes that in the present state of aeronautic science the only practical regulation of aerial war lies along the line of rendering it as humane as possible, without attempting to prevent it, a position assumed by the Institute. When the warlike uses of aircraft are thoroughly understood, the states will be willing to confine their activities within bounds by agreement. Baron de Stael-Holstein has impaired the value of his plea by failing to note that disposition among the states of the world.

DENYS P. MYERS.

International Courts of Arbitration. By Thomas Balch, 1874. Fourth edition edited with an introduction and additional notes by Thomas Willing Balch. Allen, Lane and Scott: Philadelphia. 1912. pp. viii, 68.

This little monograph, of which a fourth edition has just appeared in sumptuous form with introduction and notes supplied by the author's son, who is himself well known for his interest in international affairs, recalls the fact that during our Civil War, Mr. Balch, Senior, labored in public and private to create a sentiment in favor of the submission of the so-called Alabama Claims to international arbitration. In November, 1864, he had an interview with President Lincoln and suggested the arbitration of our difficulties with Great Britain. The President thought it "a very amicable idea, but not possible just now, as the millenium is still a long way off." Apparently in conclusion and by way of encouragement he added: "Start your idea. It may make its way in time as it is a good one" (page 10, note). As far as these special claims were concerned, the millenium which was still a good way off, came within a few years, for it is common knowledge that the Alabama Claims were arbitrated in 1872.

Mr. Balch was untiring in his advocacy of arbitration, and just at the

close of the Civil War got a letter on the subject published in the *New York Tribune* (May 13, 1865). In this he suggested the appointment by each country of a competent jurist, which two should select the umpire. He argued and rightly against submission to a sovereign. The letter was reprinted two years later in England in *Social Science*. Mr. Balch's views were unpopular at the time on both sides of the Atlantic, and he certainly deserves great credit for standing for the right when its adherents were few. It is a fortunate thing for a country when its public opinion coincides with the views of its enlightened citizens.

Mr. Balch's pamphlet contains some interesting passages from letters of Richard Cobden and one from Professor Lorimer of Edinburgh on the nature and limitations of arbitration.

JAMES BROWN SCOTT.

The Full Recognition of Japan. Being a Detailed Account of the Economic Progress of the Japanese Empire to 1911. By Robert P. Porter. With seven colored maps. London: Henry Frowde, Oxford University Press. 1911.

This sumptuous volume of nearly 800 pages is a monumental evidence of the intellectual and physical activity of our old friend Mr. Robert P. Porter, long a citizen of the United States, and the Director of the Eleventh Federal Census, but for the last twelve years a citizen of England, and one of the most trusted editorial writers and correspondents of the *London Times*. Mr. Porter has visited all the continents of the globe in behalf of the *Times*, and his letters have formed the basis of many volumes, including this one. The book is the result of two prolonged trips through all parts of Japan and the countries within her sphere of influence, — the first in 1896, and again in 1910. It was during this interval that the great political and industrial developments which marked the reign of the Emperor Mutsuhito were successfully imposed upon the outworn civilization of Japan, and the fiction of "the changeless East" was forever dispelled. Mr. Porter's especial qualification to make this study appears in the opportunity he had, in an interval of ten years, to study the reconstruction of Japan in the making. In these forty chapters, he has summarized the early history of Japan and described the remarkable evolution of the Meiji era; the physical characteristics of Japan, its population, occupations and emigration; its army and navy; its agriculture, forestry, mineral resources and marine prod-

ucts; its railways and other public works; its industrial progress, with some account of wages and the conditions of labor; its trade, commerce and shipping, with a general analysis of the new Japanese tariff, and its economic and financial effects. There are also detailed descriptions of its three larger cities, Tokyo, Osaka and Kyoto.

Thus we find here the latest available statistical information regarding all phases of the extraordinary economic progress of the great empire of the Orient. Mr. Porter is the master of a graphic, trenchant style, and has the rare ability to clothe statistics with a human interest. Whoever desires a complete record of the economic development of Japan, and the figures which measure and demonstrate it, will find that record here in most readable and effective form. There is no country in the world where an economic development transplanted upon a civilization older than recorded history, has blossomed so suddenly, developed so rapidly, and proved itself so efficient. One great reason for this is stated by Mr. Porter: "Japan absorbs, she does not copy. After the Restoration she set herself to enfold the whole new world of thought and activity. * * * These undertakings have been carried through by Japanese themselves in their own way. They have accepted the new without wholly abandoning the old when it might still be useful, and have shown their wisdom by taking the best of both the Eastern and the Western worlds. What Japan has set out to do has been to hammer and weld the civilizations of the two hemispheres, and to shape them into one harmonious whole." This is Mr. Porter's explanation of what has appeared to be the real phenomenon of the Japanese evolution: — the successful superimposition, in the comparatively short interval of a quarter of a century, of the ideas, the methods, the nomenclature, and the practical administrative operation, of another system, radically different in all fundamental postulates, from those which had prevailed for a period of time since when the memory of man runs not to the contrary. If the thing had not been actually done, political and social scientists would agree that it could not possibly be done, — at least in a period of time so short; and they would base their conviction very largely upon the experience of England in India. Here, after a lapse of more than half a century, it would seem that the old civilization persists, with all its superstitions and traditions, and will continue to persist, in the face of the best efforts of the British Government, guided by her wisest and most experienced statesmen, to veneer it with a coat of westernism. There is this difference between the cases of Japan and India, and per-

haps it supplies the only explanation needed: in Japan the evolution was inspired, guided, and effected by the hereditary ruler of the country, a monarch held in sacred reverence to a degree unknown in western countries, by all classes and by the masses of the Japanese people; in India, on the other hand, the whole movement was initiated, organized, and forced, not always wisely, by the agents and representatives of a nation which was a conqueror and never failed to play the rôle of the conqueror. In the one case, the evolution was voluntary, and was therefore welcomed; in the other, it was imposed by authority of might, and was, and is, psychologically resented and resisted. Be that as it may, the contrast is one of the most interesting facts in the history of the nineteenth century. In the case of Japan, the response of the people to the radical reforms planned and imposed by the Imperial Government in the Meiji era, must always remain a unique event in the history of civilization. Its accomplishment could only have been possible on the theory which Mr. Porter advances in the sentences quoted above. It was an almost inspired combination, commingling, and co-ordination of the East and the West, of the old and the new, worked out by a group of statesmen who will in time be recognized as ranking in ability, astuteness and far-sightedness, with any similar group any western nation has produced.

There are many chapters in the volume treating of other phases of the new Japanese civilization. One of the best is the full account of the long struggle of Japan to secure diplomatic recognition of her right to be treated as a member of the family of nations in full standing. Another is that relating to the constitution and laws, and the new civil, penal and commercial codes which were so laboriously worked out, chiefly on the model of the French and German codes, and the practical development and enforcement of which were the prerequisites to the surrender of rights of extraterritorial jurisdiction in Japan by the great western nations.

Other chapters treat of Japanese literature, drama, music, journalism, sports and amusements. There are chapters on Japanese prison reform, Japanese philanthropy, and the Japanese system of education. The latter is defective from the point of view of an American in its failure to make record of the remarkable services rendered by American educators in the remodeling and upbuilding of the entire educational system of Japan. Neither is there sufficient recognition of the great work done by the missionaries in Japan; and the name of Guido F. Verbeck no-

where appears in its pages. What the book further lacks, if it was intended to be a complete picture of the Japanese people, is a study of their religion, and also a study of the Japanese character, which remains, notwithstanding the complete Occidentalization of the political, legal and economic Japan, as completely Oriental as it ever was. No better evidence of this can be asked than the voluntary and dramatic death of the great Japanese General Nogi and his wife, — carefully premeditated, who committed joint suicide upon the day and at the hour of the funeral of the Emperor Mutsuhito, as a tribute to his memory and an offering for the peace of his soul. Voluntary death for a practical purpose the West can understand; as when Germanicus tried to stab himself before his revolting legions in order to bring them to submission through their sense of shame; suicide merely as a testimony to a cause is beyond our comprehension; and well as we have come to know Japan, deeply as we sympathize with her aspirations and achievements, we are obliged to confess, as did Lafcadio Hearn, who gave his life to the study of the Japanese, that we really understand the people not at all.

Especially valuable and interesting are the chapters on Korea, Formosa, Karafuto and Hokkaido, sections of Japan about which comparatively little has been written or is known. Mr. Porter's travels in these parts were extensive and his observation acute. The reforms which Japan began in Korea as early as 1905, and has continued and extended since the annexation in 1910, are lifting out of mediæval backwardness and modern corruption, a country not economically important, but certainly worth rescuing from the darkness which has engulfed it for ages. The chapter on Manchuria gives unexpected impressions of the agricultural and mineral wealth and the economic possibilities of that great and almost unknown country. Mr. Porter likens it in some ways to Argentina, which is larger in area, but possesses but about one half the population of Manchuria. "The Manchurian fields are far better tilled than those of the Argentine Republic; but the people of the former utilize the methods of two hundred years ago; they convey their produce to the rivers in primitive carts, while the Argentine farmer moves his crops on a perfect network of railways." There is an interesting account of the railroads constructed or contemplated in Manchuria, under Japanese and Russian auspices. The slow progress made is thus explained: "By the time Russia and Japan agree, and China makes up its mind, and other countries decide on the financing and material to be used in construction, a good many years must have

elapsed." The tripartite arrangements under which the development of Manchuria is progressing, present one of the most curious and indefinite phases of modern internationalism; and this book throws but little light upon its details.

S. N. D. NORTH.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

[For table of abbreviations used, see Chronicle of International Events, p. 985]

- Aeronautics.* Airships and aeroplanes. *Quart. R.*, 217:220. July.
- . Jurisprudence of the air, *The. H. Brougham Leech. Fort.*, 92 (98):235 Aug.
- Africa.* European re-conquest of North Africa. *A. C. Coolidge. Am. hist. R.*, 17:723. July.
- . France in Africa: her occupation of Fashoda. *R. of R. (N. Y.)*, 46:97. July.
- Albania.* Question Albanaise, *La. André Chéredame. Le corresp.*, June, p. 1171.
- . Question Albanaise, *La. André Duboscq. Revue bleue*, 49:793. June.
- Algeria.* Installation de la France en Algérie, *L'. Christian Schefer. Le corresp.*, July, p. 205.
- Alsace-Lorraine.* Alsace-Lorraine de Bismarck devant l'histoire et de la diplomatie, *L'. Baron Bonnal de Ganges. R. du Monde*, 191:280. Aug.
- America.* America moderna, *La. La España Moderna*, 280:158; 282:148. April-June.
- American Society of International Law.* Société américain de droit international. *Th. W. Balch. R. de dr. int. et de légis. comp.*, 14:290.
- Arbitral Court.* Some suggestions as to the International Court of Justice. *Benjamin F. Trueblood. Ad. of Peace*, 74:174. July.
- . Ueber isolierte und institutionelle Schiedsgerichte. *Henri Lammasch. Jahrbuch des öffentl. Rechts*, 6:76.
- Arbitration.* Clauses compromissaires et clauses générales d'arbitrage, de médiation, etc. *Jacques Dumas. La paix par le droit*, 23:420. July.
- . Sénat américain et les traités d'arbitrage avec la France et la Grande Bretagne du 3 août 1911, *Le. M. Alexandre André. R. gen. de dr. int. public*, 19:350.
- . Nouveau traités d'arbitrage obligatoire entre l'Etats-Unis, l'Angleterre et la France, *Les. Georges Scelle. R. pol. et parl.*, 73:56. July.
- . President Taft's arbitration policy. *Richard Bartholdt. Ad. of Peace*, 74:171. July.
- . Tafts Voldgiftstraktater. *Freds-Bladet*, 21:33. May.
- . United States and Canada in practical arbitration. *Wm. R. Riddell. Ad. of Peace*, 74:192. Aug.
- Armaments.* Abrüstung. *A. G. Grosch. Völker-Friede*, 6:53. June.
- . Armed peace and the increased cost of living. *A. Velleman. Peace Movement*, 1:224. July.
- . Armements à la Chambre des communes, *Les. Réponse de l'Angleterre à l'Allemagne. Mouvement pacifiste*, 1:260. Aug.

- . Bewaffneter Frieden und Lebenssteuerung. *A. Velleman*. Friedens-Bewegung, 1:224. July.
- . Bewaffnete Frieden, Der. Auszug aus dem "Journal Officiel" der französischen Republic. Friedens-Bewegung, 1:205. June.
- . Extrait du journal officiel de la République Française. Mouvement pacifiste, 1:205. June.
- . Imperial defence and finance. *Edgar Crammond*. 19th Cent., 72:221. July.
- . M. Paul Meunier's budget speech in the French Chamber. Official report. Peace Movement, 1:206. June.
- . Navy debate in the House of Commons, The. England's answer to Germany. Peace Movement, 1:259. Aug.
- . Paix armée et le renchérissement de la vie, La. *A. Velleman*. Mouvement pacifiste, 1:224. July.
- . Rüstungsfrage im Unterhaus, Die. Englands Antwort an Deutschland. Friedens-Bewegung, 1:258. Aug.
- Australia*. Australia's doubtful future. *R. of R.*, (N. Y.) 46:103. July.
- . Outlook from Australia, The. *Hon. James Alexander Hogue*. 19th Cent., 72:1. Aug.
- Austria-Hungary*. Austria-Hungaria. *X. España y América*, 10:476. June.
- . Dictature en Croatie, L'Autriche-Hongrie vue d'Agram. *René Henry*. *Q. dip.*, 33:646. June.
- Balance of power*. Germany and the balance of power. *H. N. Brailsford*. *Contemp.*, 102:18. July.
- Banking*. Influence of banking upon international relations, The. *Norman Angell*. *Bankers M.*, 84:475. April.
- Belgium*. Expéditions françaises en Belgique en 1831 et 1832. *Ernest Nys*. *R. de dr. int. et de légis. comp.*, 14:291.
- Bosphorus*. Fortifications du Bosphore, Les. *Jacques Dorobantz*. *Q. dip.*, 33:669. June.
- Canada*. Canadian problems and politics. *W. A. Douglass*. *Westm. R.*, 177:398. April.
- . International trade relations and reciprocity between Canada and the United States. *W. R. Riddell*. *Queen's Q.*, 19:330. April-June.
- China*. A l'assemblée législative. *R. jaune*, 2:272. June.
- . Changing China. *William Wirt Lockwood*. *Ind.*, 73:126. July.
- . Changing Chinese. *E. A. Ross*. *Review Science*, n. s., 35:64. Jan.; *Pol. Sci. Q.*, 27:348. June.
- . Changing Chinese and coming China. *E. F. Baldwin*. *Outlook*, 101:643. July.
- . China, the new Republic. *T. Iyenaga*. *World's Work*, 19:597. May.
- . Chinese revolution, The. *Quart. R.*, 716:536. April.
- . Chinese revolution and the world's peace, The. *Count Shigenobu Okuma*. *Ind.*, 73:179. July.
- . Destiny of China, The. *C. J. L. Gilson*. *Dublin R.*, 150:325. April.
- . Discussions sur le future régime chinoise. *R. jaune*, 2:243. June.
- . Great Republic of China, The. *Robert Machray*. *Fort.*, 92 (97):128. July.

- . Histoire de la revolution chinoise. *Han-Jou-Kia et Louis Laloy*. Grande R., 16:225. May.
- . Premier jury chinois, Le. R. jaune, 2:213. May.
- . Reconnaissance de la république, La. R. jaune, 2:195. May.
- . Réformisme de Yuan-Chi-Kai. R. jaune, 2:204. May.
- . Rivoluzione cinese e Yuan-Ci-Kai, La. *Nouva Antol.*, 47:432. Aug.
- . Young China and young Turkey. *J. O. P. Bland*. National R., 59:884. July.
- Colombia*. Insigne colombiano, El. *Filipe Angulo y R. M. Palacio*. España y América, 10:353. May.
- . Reseña de la provincia y ciudad de Mompós (Colombia). *M. de Sabuy*. España y América, 10:238. May.
- Contraband of War*. Contrebande de guerre, La. *John Bassett Moore*. R. de dr. int. et de légis. comp., 14:221.
- Crete*. Questione cretese, La. *A. Cavaglieri*. Riv. dir. int. serie II, vol. 1:244.
- Cuba*. Cuba and the Cuban question. *Sydney Brooks*. N. Amer. R., 196:52. July.
- . États-Unis et Cuba, Les. *Henri Marchand*. Q. dip., 34:93. July.
- . États Unis et Cuba (rectification), Les. *Henri Marchand*. Q. dip., 34:171. Aug.
- . Political situation in Cuba, The. R. of R. (N. Y.), 46:45. July.
- . Question cubaine, La. *Paul Maistre*. Revue bleue, 50:87, 106. July.
- Dardanelles*. Closing the Dardanelles. By *Diplomatist*. Empire R., 23:213. May.
- . Dardanellen-Streitigkeiten. *Den Beer Poortugael*. Friedens-Warte, 14:203. June.
- . Franco-Russian alliance and the Dardanelles, The. Ind., 73:465. Aug.
- Denmark*. Dinamarca. X. España y América, 10:477. June.
- Eastern Question*. Affaires d'Orient, Les. *Gabriel Hanotaux*. R. hebdom., 7:46. June.
- . France and Russia in the East. Eng. R., 12:99. Aug.
- Egypt*. Lord Kitchener and Egypt. *Sir George Arthur*. Fort., 92 (97) 15. July.
- Emigration*. Emigración o española al Brasil. *L. M. Gomez*. España y América, 10:34. July.
- . De la influencia ejercida por la emigración judica de España y Portugal en el desenvolvimiento economico del globo. *S. Schwarz*. La España Moderna, 282:103. June.
- Europe*. Situation politique en Europe. *General Massenet*. Nouvelle R., 4^e série, 1:533. June.
- Exchange, Bills of*. Unita internazionale del diritto cambiario, L'. *Conazio Cozzi*. La Vita Int., 15:399. Aug.
- Exterritoriality*. Exterritorialitätsrechte. *Emile Flourens*. Deutsche R., 37:241. Aug.
- Foreign Judgments*. Execution des jugements en pays étrangers, L'. *Albéric Rolin*. R. de dr. int. et de légis. comp., 14:248.
- France*. Francia. Por X. España y América, 10:282, 379, 474. May-June.
- . Españoles en la revolución Francesa, Los. *Miguel S. Oliver*. La España Moderna, 280:53. April.

- . Franco-Russian incident. Recall of French Ambassador. *Outlook* (Lond.), 29:753. May.
- . France et Italie. *Scipio Sighéle et Albert Dauzat*. *La Revue*, 23:178 July.
- . Rejuvenescence of France. *Blackw.*, 191:875. June.
- Germany. Allemagne en Turquie, L'. *Jean Leune*. *Nouvelle R.*, 4^e série, 2:289. Aug.
- . Significant tendencies in German-American policies. *J. Salyn Shapiro*. *Forum*, 47:685. June.
- . Ansichten englischer Unterhausmitglieder über die Beziehungen zwischen Deutschland und England. Mit Einleitung von Arthur Ponsonby. *Deutsche R.*, 37:129. Aug.
- . [Anglo-German conciliation. Symposium edited by Prof. Ludwig Stein, giving views of leading German and English authorities on Anglo-German relations.] *Nord und Sud*. June-July.
- . Anglo-German mirage, The. *Sidney Whitman*. *Fort*. 92 (97):193. Aug.
- . Anglo-German relations. By *Diplomatist*. *Empire R.*, 23:219. May.
- . Anglo-German relations. *Nation* (N. Y.), 95:72. July.
- . Aproximación Anglo-Alemania. *Mariano Marfil*. *Nuestro Tiempo*, 12:177. May.
- . Bases of Anglo-German friendship. *Nicholas Homa Homyakov*. *Russian R.*, 1:9. April.
- . Deutsch-englische Krisis vom Sommer 1911, Die. *Völker-Friede*, 6:50, 62. June-July.
- . Krieg oder Verständigung zwischen Deutschland und England. *N. Bemold*. *Öster. Rund*, 32:254. Aug.
- . Rivalité navale Anglo-Allemande, La. *L. de St. Victor de St. V. Blancard*. *Le corresp.*, June, p. 833.
- . What war with Germany would mean. *Nation* (Lond.), 11:645. Aug.
- Great Britain. Anglo-Russian friendship and its limitations. *E. J. Dillon*. *Contemp.* 102:267. Aug.
- . Britannia contra mundum? *Nation* (Lond.), 11:497. July.
- . Our dangerous foreign policy. *T. G. Martin*. *Nation* (Lond.), 11:660. Aug.
- . Plea for a liberal foreign policy. *Baron de Forest*. *Nation* (Lond.), 11:650. Aug.
- . Real danger seat, The. *National R.*, 59:565. June.
- Greece. Nouvelle question des îles grecques, La. *Y. M. Goblet*. *Q. dip.*, 34:97. July.
- Hague Conference. Proposed program for the Third Hague Conference, A. *William I. Hull*. *Ad. of Peace*, 72:147. June.
- Hague Court. Hague Court — its functions and history, The. *Jackson H. Ralston*. *Amer. Law R.*, 46:517. July-Aug.
- . Italien und Peru vor den Haager Schiedshofe. *Hans Wehberg*. *Friedens-Warte*, 14:208. June.
- Haldane, Viscount. Lord Haldane et l'Allemagne-moderne. *A. de Tarlé*. *La Revue*, 96:341.

- Holland.* Point de vue hollandais dans la politique internationale, Le. *Cornelius*. Q. dip., 34:18. July.
- India.* Balance of power in India. *H. P. K. Skepton*. *Empire R.*, 23:222. May.
- . Défence de l'Inde, La. *A. de Tarlé*. Q. dip., 34:215. Aug.
- . Imperial policy and foreign relations. *Archibald Hurd*. *Fort.*, 92 (97):53. July.
- Indo-China.* Notre politique coloniale en Indochine. *Lieutenant Colonel Debon*. Q. dip., 34:85. July.
- Industrial Property.* Indicaciones de procedencia en la propiedad industrial, Las. *Pedro-Pedrerol y Rubi*. *Nuestro Tiempo*. 37:179. Feb.
- International Awards.* Judicial determination of international awards. *Samuel J. Elder*. *New England M.*, 47:133. May.
- International Law.* Avenir du droit international public, L'. *J. de Louter*. R. gén. de dr. int. public, 19:281.
- International Law Association.* Association de droit international. (International Law Association.) R. de dr. int. et de légis. comp., 14:307.
- . Conference of the International law association. *Thomas Baty*. *Peace Movement*, 1:234. July.
- . Conférence de l'International law association. *Th. Baty*. *Mouvement pacifiste*, 1:234. July.
- . International law association. *Th. Baty*. *Friedens-Bewegung*, 1:234. July.
- Interparliamentary Union.* Zur Genfer Tagung der Interparlamentarischen Union. *Hans Wehberg*. *Friedens-Warte*, 34:286. Aug.
- Intervention.* Backward nation, The. *Theodore Marburg*. *Ind.*, 72:1365. June.
- Italy.* Mazzini, Crispi, and Italy as a world power. *R. of R. (N. Y.)*, 46:113. July.
- Islam.* Dernier mot de l'Islam à L'Europe. *Chéik Abd-ul-Haqq Baghdadi*. R. du monde, 190:256. May.
- Japan.* Emperor of Japan, The. [Mutsuhito.] *Hamilton Holt*. *Ind.*, 73:272. Aug.
- . Japan and the powers. *Nation (N. Y.)*, 95:94. Aug.
- Korea.* Japan's task in Korea. *David Starr Jordan*. R. of R. (N. Y.), 46:81. July.
- . Annexation of Korea. *Geo. T. Ladd*. *Yale R.*, 1:639. July.
- . Korean conspiracy, The. *Ind.*, 73:282. Aug.
- League of the Rights of Nations.* League of the rights of nations, The. *Charles Gide*. *Peace movement*, 1:198. June.
- . Ligue du droit des peuples, La. *Charles Gide*. *Mouvement pacifiste*, 1:198. June.
- . Liga für die Rechte der Völker, Die. *Charles Gide*. *Friedens-Bewegung*, 1:198. June.
- Mediterranean.* Great Britain and the Mediterranean. *E. J. Dillon*. *Contemp.*, 102:278. Aug.
- . Mediterranean peril and how to meet it. *H. W. Wilson*. *National R.* 59:816. July.
- . Suprématie navale de la France dans la Méditerranée. *A. de Schilder*. R. du Monde, 191:141. July.

- . Surrender of the Mediterranean: The military aspect, *The. Cecil Battine. Fort.*, 92 (97):261. Aug.
- Mexico.* Cronica Méjicana. *M. B. Garcia.* España y América, 10:145. April.
- . Political Mexico to-day. *Frank Lewis Nason.* Yale R., 1:586. July.
- . Independencia de Méjico, La. *H. Herrero.* España y América, 10:40. April.
- . Mexican revolution: its causes and consequences. *L. S. Rowe.* Pol. Sci. Q., 27:281. June.
- . Situation in Mexico, *The. President Francisco I. Madero.* Ind., 72:298. Aug.
- Monroe Doctrine.* Doctrina de Monroe, La. Discurso del Hon. Philander C. Knox. S. de E. de la U. A. en N. York, el 19 de Enero de 1912. Ateneo, num. 27:19. March.
- . Japan and the Monroe Doctrine. *Liv. Age*, 274:48. July.
- . Mexique, les Etats-Unis et le Japon, La. *A. T. Q. dip.*, 33:664. June.
- . No Japanese plot in Mexico. *R. of R. (N. Y.)*, 45:529. May.
- . Lodge-Monroe Doctrine, *The.* Ind., 72:339. Aug.
- . Monroe Doctrine. Notable Pan-American addresses. *P. A. U.*, 34:780. June.
- Morocco.* Affaire marocaine, L'. *Q. dip.*, 34:172. Aug.
- . L'affaire marocaine. *Q. dip.*, 34:43, 107. July.
- . Francia, España é Inglaterra en Marruecos. *Nuestro Tiempo*, 38:5. April.
- . Gens de guerre au Maroc. *Emile Nolly.* R. de Paris, 19:633. Aug.
- . Protection français en Marruecos, E. (Textos). *Mariano Marfil.* Nuestro Tiempo, 38:183. May.
- . Questions des missions religieuses au Maroc, La. *J. Causse.* *Q. dip.*, 34:65. July.
- . "Truth" about the Franco-German crisis: A reply to M. Philippe Miller, *The. E. D. Morel.* 19th Cent., 72:32. Aug.
- . Zona de influencia francesa al sur de Marruecos, La. *Francisco Lozano Muñoz.* Nuestro Tiempo, 38:145. May.
- Navigation.* International regulation of ocean travel to-day. *R. of R. (N. Y.)*, 45:737. June.
- Netherlands.* Politique extérieure des Pays-Bas. *Pierre Long.* *Q. dip.*, 33:673. June.
- Neutralization.* Neutralization. La Neutralité Scandinave. Neutralisation des canaux et détroits maritimes. *États-Unis d'Europe*, 11:45. May.
- Nicaragua.* Revolution in Nicaragua. *Ind.*, 73:464. Aug.
- . Nicaragua. X. España y América, 10:382. May.
- . Our mission in Nicaragua. *Charles A. Conant.* N. Amer. R., 196:63. July.
- Occupation of territory.* Delle cosiddette "occupazioni qualificate" nel diritto internazionale. *C. Ghirardini.* Rivista di dir. int., serie II, vol. 1:193.
- Open sea.* Is Hudson Bay a closed or an open Sea? *Thomas Willing Balch.* Canadian Law Times, 32:632. Aug.
- Opium.* Conférence de l'opium. *Pierre Clerget.* Mouvement pacifiste, 1:232. July.

- . Opium question, The. *Pierre Clerget*. *Peace Movement*, 1:231. July.
- . Opiumfrage, Die. *Pierre Clerget*. *Friedens-Bewegung*, 1:232. July.
- Panama Canal*. British protest, The. *Nation* (N. Y.), 95:48. July.
- . Canal de Panama et le tonnage maritime, Le. *Francois Mange*. *R. de Paris*, 4:179. July.
- . Panama Canal dues. *Nation* (Lond.), 11:724. Aug.
- . Panama Canal tolls. *Ad. of Peace*, 74:181. Aug.
- . Panama Canal tolls. *Ind.*, 73:212. July.
- . Panama Canal traffic and tolls. *E. R. Johnson*. *N. Amer. R.*, 196:174. Aug.
- . Panama Canal traffic and tolls. *E. R. Johnson*. *Ind.*, 72:356. Aug.
- . Panama pledges. *Nation* (Lond.), 11:575. July.
- . Percement du canal de Panama et les colonies françaises, Le. *Louis Le Barbier*. *La France de Demain*, 17:325. June.
- . Why should we fortify the Panama Canal? *F. W. Mondell*. *Ind.*, 73:71. July.
- . Panama Canal bill. *Ind.*, 73:463. Aug.
- Pan American Affairs*. Aspects of Latin American revolutions. *Chambers's Journal*, 2:356. June.
- . Pan America at Lake Mohonk Conference. *P. A. U.*, 35:110. July.
- . Our danger in Central America. *William B. Hale*. *World's Work*, 24:418. Aug.
- . Secretary Knox's mission. *P. A. U.*, 35:16. July.
- . Knoz en jira de atracción hispanoamericana. *España y América*, 10:149, 383, 478. April-June.
- . Orientacion Americana. *Ateneo num.* 29:1. May.
- Peace*. Cardinal Alberoni, pacifiste, Le. *Mil. R. Vesnitch*. *R. d'hist. dip.*, 26:352. July.
- . "Clause d'honneur" jugée par un professeur allemand [Prof. Pohl], La. *Hans Wehberg*. *Mouvement pacifiste*, 1:255. Aug.
- . Deutscher Professor über die Ehrenklausel. [Prof. Pohl.] *Hans Wehberg*. *Friedens-Bewegung*, 1:255. Aug.
- . Esprit, international, L'. *Nicholas Murray Butler*. *Le Mouvement pacifiste*, 1:180. June.
- . Friedenspolitik und militärische Ratgeber. *Friedens-Warte*, 14:201. June.
- . German Professor [Prof. Pohl.] on the "Honor clause," A. *Hans Wehberg*. *Peace Movement*, 1:255. Aug.
- . Gesichtsunterricht und die Friedensidee. *Iro Ojserkis*. *Friedens-Warte*, 14:215. June.
- . Guerre et la paix dans le monde, La. *J. J. Prudhommeaux*. *La paix par le droit*, 22:468. July.
- . Internationale Gesinnung, Die. *Nicholas Murray Butler*. *Friedens-Bewegung*, 1:180. June.
- . International mind, The. *Nicholas Murray Butler*. *Peace Movement*, 1:180. June; same. *Ad. of Peace*, 74:143. June.
- . Kann man dem Wetttrüsten Einhalt tun? *Richard Gädke*. *Friedens-Warte*, 34:283. Aug.

- . "Menschenschalchthaus." *Alfred H. Fried. Friedens-Warte*, 14:281. Aug.
- . Mouvement de la paix au Japon, Le. *J. J. Prudhommeaux. La paix par le droit*, 22:462. July.
- . Moyen d'assurer la paix, Un. *O. Umfrid. Mouvement pacifiste*, 1:203.
- . National honor and vital interests. *C. Russell Weisman. Ad. of Peace*, 74:169. July.
- . Need of a Peace Commission, The. *Ind.*, 73:276. Aug.
- . New pacifism, The. *Quart. R.*, 217:202. July.
- . Pacifisme et patriotisme: leur sincère conciliation. *Lucien Roques. La paix par le droit*, 22:452. July.
- . Path of peace: An obstacle in the way, The. *O. Umfrid. Peace movement*, 1:203. June.
- . Problem of universal peace. *W. P. S. Cath. World*, 95:516. July.
- . Proben auf dem Weg der Friedenssicherung, Ein. *O. Umfrid. Friedens-Bewegung*, 1:203.
- . Trifling with good faith. *Nation (N. Y.)*, 95:96. Aug.
- . Zur "Realpolitik und Friedensbewegung." *Anna B. Eckstein. Friedens-Warte*, 34:289. Aug.
- Persia.* Agonia della Persia, L'. *Adolfo Gulenelli. Rass. Naz.*, 185:507. June.
- . Persian crisis. *Russian R.*, 1:130. April.
- . Shuster's own story. *W. Morgan Shuster. Hearst's M.*, 21:2432. June.
- Peru.* Desde el Peru. *P. M. Velez. España y América*, 10:151. April.
- . Peru en 1839: Carta inédita al José Muñoz Capilla. *J. A. de Calo. España y América*, 10:335. May.
- Portugal.* Deux anarchies européennes: l'ottomane et la portugaise et leurs conséquences, Les. *Commandant de Thomasson. Q. dip.*, 34:129. Aug.
- Railways.* Baron and his Bagdad railway, The. [Baron Marschall von Bieberstein.] *Lovatt Fraser. National R.*, 58:605. June.
- . Chemin de fer de Bagdad, Le. *E. Lémonon. R. gén. de dr. int. public*, 19:318.
- . Madness of the Russo-Indian railway, The. *Nation (Lond.)*, 11:534. July.
- Recognition.* Diplomacia francesa y el reconocimiento de la Independencia de Buenos Aires, Colombia y Méjico por Inglaterra (1825). *C. A. Villanueva. España y América*, 10:393. June.
- Russia.* Working Russian constitution, A. *Baron A. Meyendorff. Russian R.*, 1:27. April.
- . Rapports de la Suède et de la Russie, Les. *Erik Sjoestedt. Q. dip.*, 34:193. Aug.
- . Russia, Finland and Scandinavia. *V. Whitford. Contemp.*, 102:211. Aug.
- Sea Power.* Germany as a sea power. *W. H. Beehler. Cent.*, 84:308. July.
- . Suprematie maritime de l'Angleterre, La. *Albert Milhaud. Grande R.*, 16:244. May.
- Spain.* España. *P. C. Negrete. España y América*, 10:277, 371, 462, 564. May-June.
- . Rentrée des Cortes et la situation politique et financière de l'Espagne. *Angel Marraud. Q. dip.*, 33:657.

- . Situation politica en España, La. *Salvador Canals*. *Nuestro Tiempo*, 37:192. Feb.
- . Spain. Una crisis parcial. *Salvador Canals*. *Nuestro Tiempo*, 38:84. April.
- . Spain. Una embajada interesante. *El Marques de Alquebla*. *Nuestro Tiempo*, 37:356, 38:59, 190.
- Sugar Conventions*. Régime des sucres (protocole) de Bruxelles du 17 mai 1912, Le. *L. Couzinet*. *R. de science et de légis. financières*, 10:242. April-June.
- . Story of the Brussels Sugar Convention, The. *Nation* (Lond.), 11:686. Aug.
- Telegraph*. Interets français et les relations télégraphiques internationales, Les. *Léon Jacob*. *Q. dip.*, 34:156. Aug.
- Treaties*. Anglo-Russian trade treaty of 1734. *Peter Struvé*. *Russian R.*, 1:20. April.
- . Bruits de conférence européenne et d'alliance franco-anglaise, Les. *Commandant de Thomasson*. *Q. dip.*, 33:641. June.
- . Lord Ashburton and the treaty of Washington. *E. D. Adams*. *Am. hist. R.*, 17:764. July.
- Triple Alliance*. Alrededor de la Triplíce. *Mariano Marfil*. *Nuestro Tiempo*, 38:83. April.
- . Tsar and Kaiser in the limelight. *E. J. Dillon*. *Contemp.*, 102:261. Aug.
- Tripoli*. Guerra Turco-Italiano, La. *Mariano Marfil*. *Nuestro Tiempo*. 38:188. May.
- . Guerre italo-turque et la situation en Orient, La. *Raymond Recouly*. *R. pol. et parl.*, 73:127. July.
- . Lösung des italienisch-türkischen Konflikts, Die. *Von einem Ausländischen Politiker*. *Deutsche R.*, 37:181. Aug.
- . Nostra guerra con la Turchia, La. * * * *Rivista di dir. int.*, serie II, vol., 1:224.
- . Tripolis und kein Ende. *Völker-Friede*, 6:49. June.
- . Tripolitan war. *G. T. Abbott*. *Quart. R.*, 217:249. July.
- . Zum italienisch-Türkischen Streit wegen Tripolis. *Von einem österreichischen Staatsmann*. *A. D. Deutsche R.*, 37:143. Aug.
- Turkey*. Perils of Turkey, The. *Nation* (Lond.), 11:685. Aug.
- . Turkey in war time. *Francis E. Clark*. *Ind.*, 73:487. Aug.
- Venezuela*. British mercenaries in Venezuela. *Blackw.*, 191:848. June.
- War*. Guerre, qui fuse-La guerre qui s'use, La. *Léon Bollack*. *Mouvement pacifiste*, 1:211. June.
- . Slow decay of war, The. *Léon Bollack*. *Peace Movement*, 1:212. June.
- . Modern wars and war taxes. *W. R. Lawson*. *Nation*, 95:60. July.
- . War not inevitable: All international disputes arbitrable. *Jackson H. Ralston*. *Ad. of Peace*, 74:148. June.
- . War is coming to an end: for want of money, The. *E. J. Dillon*. *Contemp.*, 102:109. July.

KATHRYN SELLERS.



**Index photographed at the
beginning for the convenience
of the microfilm user.**